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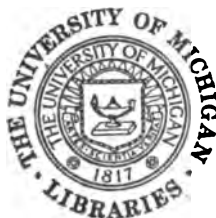
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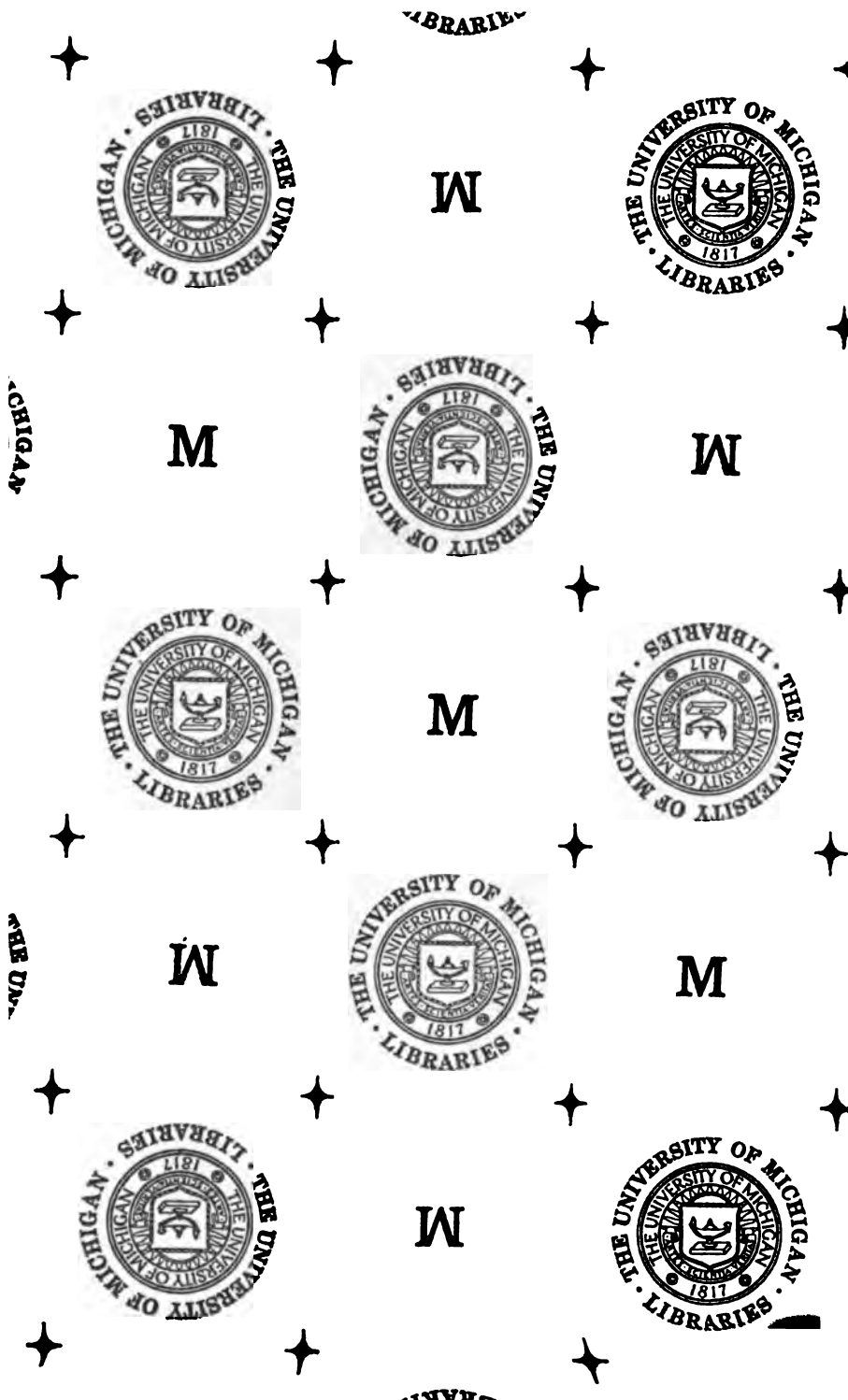


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LEADING CASES AND OPINIONS
ON
INTERNATIONAL LAW.

LEADING CASES AND OPINIONS
ON 40162
INTERNATIONAL LAW,

COLLECTED AND DIGESTED FROM

English and Foreign Reports, Official Documents,
Parliamentary Papers, and other Sources.

WITH

NOTES AND EXCURSUS,

CONTAINING THE VIEWS OF THE TEXT WRITERS ON THE TOPICS
REFERRED TO, TOGETHER WITH SUPPLEMENTARY CASES,
TREATIES, AND STATUTES.

By PITT COBBETT, M.A., B.C.L.,
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PREFACE.

THERE is some tendency' on the part of English lawyers to regard that body of custom and convention which is known as International Law, as fanciful and unreal ; as a collection of amiable opinions, rather than as a body of legal rules. The text writers have much to answer for in this respect. Their real function is to record and collate existing usage. The function which they have striven to assume has been that of authorship. They frequently prescribe, not what is, but what they think ought to be, the practice of nations. Rules originating thus, necessarily command but scanty reverence ; and perhaps nothing has tended more to lessen the esteem in which International Law is held than the misapprehension which has been thus begotten. The truth is, however, that a very large portion of International Law rests on authority as trustworthy as that which commands the homage of the English lawyer. The great body of the rules comprising the maritime Law of Nations, together with many fundamental rules in other departments, may be found in the judgments and

decisions of International tribunals, such as Boards of Arbitration and Courts of Prize, some of them presided over by judges fully as eminent as those of the Common Law. Even where such authority fails, it is still possible to draw on such sources as official documents and records, and opinions given by official jurists to their own Governments on matters of international concern. My first object in the present volume has been to bring out how much of the Law of Nations exists in this shape. With this object I have omitted in the text all reference to any but judicial and official opinions, reserving those of the text writers for explanatory notes. I am quite aware that this continual reference to case law as illustrative of topics, which sometimes seem scarcely to come within the domain of the Courts, may occasionally appear strained and awkward. Thus, the insertion of the case of the *Cherokee Nation v. The State of Georgia*, as an authority on the subject of State character, of the cases of the *Eliza Ann* and the *Teutonia* on the subject of "Declaration of War," may seem to give an untrue idea of the real origin and foundation of the rules of International Law on these subjects. My purpose, however, was not so much to indicate the origin of such rules, as to show how far they were sanctioned by the decisions of recognized legal authorities.

My other object has been to publish a selection of illustrative cases which may serve as a useful companion

volume to existing text-books. In order to preserve, as far as possible, the continuity of the subject, I have occasionally inserted cases and dealt with matters which are perhaps already treated of in ample detail.

I have found it necessary to add to many of the cases and opinions, notes explaining or collating the principal points of the case, or explaining its relation to some general topic of which it forms a part. In framing these notes I have drawn freely on standard text-books, such as those of Hall, Kent, and Wheaton, and occasionally Heffter. This mode of treatment no doubt involves some repetition. Thus, in treating of enemy property in war, it was impossible to avoid trenching to some extent on the subject of neutral liability. I can only claim to have avoided this where possible.

I have ventured to use the word "case" in its widest sense; not in any way limiting it to disputes that have been the subject of forensic litigation. Some transactions which struck me as bearing on topics treated of, but which I felt could not legitimately be classed either under cases or opinions, nor yet be conveniently embodied in notes, I have thrown into the form of Excursus. It appeared to me convenient to place each Excursus immediately after the topic to which it was most nearly related.

There are some topics which are common to the two departments of Public and (if I may venture on using the expression) Private International Law. Some of

these I thought it best to reserve for a smaller volume of cases on the Comity of Nations.

I must take this opportunity of expressing my great indebtedness to Mr. J. Z. Laurence for much valuable assistance in the compilation of the present volume. I have also to acknowledge the courtesy by which I have been permitted to reprint in this volume the substance of several articles previously published in the Law papers.

P. C.

4, KING'S BENCH WALK, TEMPLE, E.C.,
October, 1885.

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LEADING CASES AND OPINIONS

ON

INTERNATIONAL LAW.

PART I.—PEACE.

STATES.

THE CHEROKEE NATION v. THE STATE OF GEORGIA.

Temp. 1829.

[5 PETERS' REPORTS, 1.]

Case.] In 1828 and 1829 two statutes were enacted by the Legislature of the State of Georgia affecting the territory of the Cherokee Indians. This territory had been assured to them by solemn treaties on the part of the United States. It was alleged that the effect of these local laws would be to parcel out the Cherokee territory and to subject the Cherokees themselves to the jurisdiction of the State of Georgia, contrary to the treaties entered into with the United States. Proceedings were thereupon instituted in the Supreme Court of the United States to restrain the State of Georgia from giving effect to these Acts and from executing the laws of Georgia within the Cherokee territory.

Judgment.] Marshall, C.J., in delivering the judgment of the majority of the Court, dealt in the first place with the question whether the Cherokees constituted a distinct political society. It was held that they were entitled to claim this

2 *Cases and Opinions on International Law.*

character, inasmuch as they had been so treated from the time of the settlement of the country, numerous treaties having recognized them as a people capable of maintaining the relations of peace and war, and of being responsible in their political character for any violation of their engagements, and for aggressions committed on United States citizens by any individual member of their community. Laws had also been enacted in the spirit of these treaties, and Acts of Government had recognized the Cherokee Nation as a State.

Passing to the question whether they constituted a "foreign" State, the learned Chief Justice called attention in his judgment to the fact that the Cherokee territory constituted part of that belonging to the United States, and that by their treaties the Cherokees acknowledged themselves to be under the protection of the United States. Hence he concluded that their relation to the United States resembled rather that of a ward to his guardian; that they looked to the United States Government for protection; and that foreign nations considered them as being so completely under the sovereignty of the United States, that any attempt to acquire their lands would be considered by all as an invasion of United States territory.

Moreover, by the Constitution of the United States, power was given to Congress to regulate commerce with "foreign nations, the several States and the Indian tribes," and therefore it seemed that the Constitution did not comprehend Indian tribes under the general term foreign nations.

On these grounds it was held that an Indian tribe was not a "foreign State" in the sense of the Constitution, and that the action in question could not be maintained in the United States Courts.

Thompson, J., who dissented, pointed out in his judgment that the terms State and Nation implied a body of men united together to procure their mutual safety and advantage by means of the union. Every nation which governed itself without any dependence on a foreign power was a sovereign State. In this category ought to be included those States that

had bound themselves to another more powerful, although by an unequal alliance. Provided the inferior ally reserved to itself the sovereignty or the right to govern its own body, it ought to be considered an independent State. The Cherokee nation had always been dealt with as a sovereign State by the Government of the United States; they had been admitted and treated as a people governed solely and exclusively by their own laws, usages and customs within their own territory, claiming and exercising exclusive dominion over the same, yielding up by treaty from time to time portions of the land, but still claiming absolute sovereignty and self-government over what remained unsold. After a further review of the facts, the learned Judge concluded that there was as full and complete recognition of their sovereignty as if they were the absolute owners of the soil. It appeared from the cases on the subject that a foreign State judicially considered was one under a different jurisdiction or government, without any reference to its territorial position. On these grounds he was unable to perceive any sound and substantial reason why the Cherokee nation should not be considered a foreign State. Story, J., concurred with Thompson (a).

The Cherokee Nation v. The States of Georgia, 5 Peters, 1.

On the subject of International Personality, it is of course necessary to appeal to recognized usage, and the text writers who interpret it, rather than to the decisions of municipal tribunals. Nevertheless, this case, though dealing mainly with a question peculiar to the United States organisation, yet contains a fair statement of the conditions which go to make up a "foreign State."

It appears to have been admitted by all members of the Court that an organised community, governed in matters internal by its own laws and customs, and having in matters external a power of making treaties, and a recognized responsibility for aggression or violation of its engagements, was *prima facie* entitled to the character of a State. In the view of the majority of the Court, however, the claim of the

(a) As to the present status of the Indian tribes, see Wheaton's International Law, English edition, p. 38.

4 *Cases and Opinions on International Law.*

Cherokee nation to the character of a foreign State was negated by the fact that the Cherokee territory constituted part of that belonging to the United States. As a municipal tribunal, the Court was also bound to give effect to the presumption afforded by the wording of a clause in the United States constitution.

The views of the text writers substantially correspond with these principles. According to Mr. Hall, the requisites of a sovereign State are that it should be permanently established for a political end, in full possession of definite territory, and independent of external control (b). According to Professor Holland, a State may be defined as "a numerous assemblage of human beings, generally occupying a certain territory, amongst whom the will of the majority of an ascertainable class of persons is, by the strength of such a majority, or class, made to prevail against any of their number who oppose" (c).

In order that a State may be regarded as an international person, it is essential that it should be recognized by other States. Wheaton says: "But if it desires to enter into that great society of nations, all the members of which recognize rights to which they are mutually entitled, and duties which they may be called on reciprocally to fulfil, such recognition becomes necessary to the complete participation of the new State in all the advantages of this society. Every other State is at liberty to grant or refuse this recognition, subject to the consequences of its own conduct in this respect" (cc). In the case, however, of a State of sufficient power or importance to influence extensively the relations of other States, recognition must ultimately follow from the establishment of *de facto* sovereignty, although some States may be more prompt in according this than others.

A distinction is sometimes drawn between normal and abnormal international persons (d). It is suggested that the former category includes only those recognized members of the family of civilized nations which are also fully sovereign and independent. It was to this group of States that the Ottoman Empire was admitted by the Treaty of Paris in 1856; and it is as between these normal international persons that the theory of equality, and the most complete application of the rules of International Law, may be said to prevail. There is, however, some ground for thinking that, so far as European affairs are concerned, the theory of equality is now giving place to a recognized primacy on the part of the Great Powers (e). In America it may be said that the primacy of the United States, in matters of

(b) Hall, *International Law*, 2nd edition, p. 17.

(c) Holland, *Jurisprudence*, 2nd ed., p. 36.

(cc) Wheaton's *International Law*, by Lawrence, p. 39.

(d) Holland, *Jurisprudence*, 2nd ed., p. 293.

(e) Lawrence, "Essays on some disputed Questions of International Law," p. 191.

continental concern, has been a recognized principle since the enunciation of the Monroe doctrine in 1823 (*f*).

Amongst abnormal international persons are classed half sovereign and protected States (*g*), and States which, though fully independent, are yet, by reason of their difference of civilization or their removal from Western influences, not fully regarded as the subjects of International Law. It is worthy of note, however, that the increased facility for intercourse, and the rapid spread of Western ideas, are rapidly bringing such nations within its sphere.

This enumeration does not exhaust the subjects of International Law. Its rights and duties occasionally extend to organizations which are not in any sense States. Such is the case with revolted provinces or colonies, whose belligerency has been acknowledged by other States, and who are consequently entitled to issue commissions, declare blockade, exercise visit and search and other rights affecting neutral States and neutral trade, but are, on the other hand, bound by the ordinary obligations of a civilized power whilst carrying on the war. Such was the position of the Confederate States during the American Civil War.

Occasionally also we find trading corporations invested with some of the rights and obligations of International Law, mainly in regard to the exercise of internal dominion, the acquisition of new territory, and the right of making peace and war within certain limits. Such was formerly the position of the East India Company, and also of the International Association of the Congo at one stage of its career (*h*). The North Borneo Company may perhaps be referred to as affording a present illustration of this type of international personality, although the rights which it enjoys under its charter from the Crown are of a more circumscribed character (*hh*).

With the varieties of internal organization, or with the terms in which States formerly distinct have become one, with the various forms of union, personal, real, incorporate, federal (*i*) (Bundes Staat), it would seem that International Law is really not concerned. It looks only to the common international representative. If various States locally distinct have a common government to represent them internationally, they constitute strictly but one international person. It is necessary to add, however, that in personal union one agent repre-

(*f*) Wheaton's International Law. 1885.
English edition, p. 87.

(*g*) See p. 7, *infra*.

(*h*) The International Association of the Congo has since developed into the Congo Free State, under the presidency of the King of the Belgians, and the guarantee of the Great Powers. See Proceedings of the Berlin Conference, Parliamentary Papers, Africa, No. 4,

(*hh*) For further information on this subject, see "The New Ceylon," by Joseph Hatton, in which will be found the charter, dated 1st Nov., 1881.

(*i*) An excellent account of these forms of organization will be found in Wheaton, English edition by Boyd, pp. 53 to 76; see also Twiss, "Law of Nations," 2nd edition, Vol. I., c. iii.

sents two distinct international persons; also that in Confederate union (Staatenbund) the distinct personality of the different States composing the union is sometimes partially or wholly reserved. Thus in the Germanic Confederation, as established by the Act of 1815, the power of contracting alliances, of maintaining separate legations, and of making peace and war, was within certain limits reserved to the various powers composing the union (*k*).

THE "CHARKIEH."

Temp. 1873.

[L. R. 4 A. & E. 59.]

Case.] The "Charkieh" was an Egyptian steamer belonging to the Khedive, and was arrested by the order of the Court of Admiralty for running down a vessel in the Thames on the 19th of October, 1872. Application was made to restrain further proceedings on the ground that the "Charkieh" was an Egyptian Government vessel, and as such not amenable to the jurisdiction of the Court of Admiralty. It appeared that the vessel, although carrying the flag of the Ottoman Empire, had come with cargo to England, and had been entered at the Customs like an ordinary merchant ship, and at the time of the collision she was under charter to a British subject, and advertised to carry coals to Alexandria.

Judgment.] Sir Robert Phillimore in his judgment considered two questions: (1) whether the "Charkieh" could be said to be the property of a sovereign prince, and (2) whether, assuming that the Khedive enjoyed the status of a sovereign prince, the vessel could under the circumstances still claim immunity from jurisdiction. (An account of the judgment so far as regards the question of the immunity of the vessel will be found under "Public Vessels," p. 31.) On the subject of the status of the Khedive of Egypt, Sir Robert Phillimore, in giving judgment, stated as the result of an historic inquiry into the subject, that in the firmans granted

(*k*) Wheaton's International Law, English edition by Boyd, p. 64.

by the Porte to the Khedive, Egypt was invariably spoken of as one of the provinces of the Ottoman Empire; that the Egyptian army was regulated as part of the military force of the Ottoman Empire, that the taxes were imposed and levied in the name of the Porte, that the treaties of the Porte were binding on Egypt, that she had no separate *jus legationis*, and that the flag for both the army and the navy was the flag of the Porte. All these facts, according to the unanimous opinion of accredited writers, were inconsistent and incompatible with those conditions of sovereignty which were necessary to entitle a country to be ranked as one among the great community of States. With reference to the fact that the office of Khedive was hereditary, *that* did not confer on him the right of making war and peace, of sending an ambassador or of maintaining a separate military or naval force, or of governing at all except in the name and under the authority of his sovereign.

The Charkieh, L. R. 4 A. & E. 59.

The political position of Egypt would seem to have undergone considerable modification since the date of the judgment in the "*Charkieh*." By the firman of the 8th of June, 1873, the right of concluding treaties and maintaining armies was granted to Ismail I. by the then Sultan. This increased independence was not destined to last long. After the deposition of Ismail in 1879, the government of Egypt was conducted under the supervision of two controllers-general, one nominated by Great Britain and the other by France, in accordance with a decree of the Khedive of the 10th of November, 1879. In the summer of 1882 an insurrection took place, the object of which was the abolition of the foreign control in Egypt. Great Britain, however, intervened, and the authority of the Khedive was ultimately restored. Subsequently, in January, 1883, a decree was promulgated abolishing the joint control; and in November, 1883, an English financial administrator was appointed. In view of the continuance of the English occupation, and of the continuous assertion of its claims by the Porte, the international position of Egypt must still be deemed both ambiguous and anomalous.

Passing to the topic of semi-sovereign States and their position, we may define these as "States which are not free in their external relations, but which may otherwise enjoy full internal independence."

In some cases the internal independence may also be affected, but it is the limitation on its external freedom of action that International Law is alone concerned with.

In the case of the "Charkieh," Sir Robert Phillimore enumerates the more important tests of semi-sovereignty; although they need not all co-exist. Such limitations on full sovereignty may result from conquest, treaties of unequal alliance, guarantee, or protection. The United States of the Ionian Islands, whilst under the protection of Great Britain, the principalities of Roumania and Servia before the changes described below, the small principalities of Monaco and San Marino, afford instances of this type of State. The limitations on external sovereignty may vary, but such States have usually no separate *jus legationis*, being represented only by diplomatic agents or consuls, no power of contracting separate treaties, or of making peace and war, without the consent of the State on which they are dependent.

With these protected or vassal States are sometimes classed members of a confederated system of States. Here, under the terms of the union, the individual States composing it may have a separate *jus legationis*, and even a right of making peace and war, subject to conditions imposed in the general interest of the union. The Germanic Confederation, before referred to, affords an instance of this type of State organization (*l*).

There are, besides, certain permanently neutral States, which are sometimes, though it would seem with doubtful accuracy, classed under the head of half sovereign States. These are States which have been neutralized by the public act of Europe or the Great Powers. They enjoy the advantage of having their immunity from attack guaranteed them by other Powers; but they are, on the other hand, subject to an obligation not to take part in any hostilities between other Powers, and may not even enter into any engagements during peace which might jeopardize their neutrality during war. Such has been the position of Switzerland since 1815, and of Belgium since 1830 (*m*). In all other respects such States enjoy the attributes of full sovereignty.

The Treaty of Berlin of the 13th of July 1878, not only makes important changes in the international position of some of these half sovereign States, but illustrates so well the variety of the relations in which a dependent State may stand towards another State, that it may be worth while to refer briefly to some of the changes effected by it. By the provisions of this treaty, Eastern Roumelia was placed under the direct authority of the Porte, but was to have a

(*l*) See Wheaton's International Law, English edition by Boyd, p. 64.

(*m*) For an account of these per-

manently neutralized States, see Wheaton's International Law, English edition, pp. 490-493.

Christian Governor-General, to be nominated by the Porte, with the consent of the parties to the treaty, holding office for five years; and was to enjoy administrative autonomy (*mm*). Bulgaria was established as an autonomous tributary principality under the suzerainty of the Sultan, with a Christian government and a national militia; the Prince was to be chosen by the population of the principality, and his election confirmed by the Porte with the assent of the parties to the treaty, no member of the reigning families of Europe being eligible; difference of creed was to form no ground of disability; existing treaties between the Porte and foreign Powers were to remain in force, and the principality was to bear a portion of the public Turkish debt. Montenegro was recognized as an independent State; new territory was added to the principality, in return for which it was to bear a part of the public Turkish debt; difference of creed was to form no ground of disability; but the new State was not to have any ships or any flags of war. Serbia was recognized as an independent State, subject to the condition that difference of religion was not to be punished, and freedom of worship was to be assured to all persons; in return for an accession of territory Serbia also was burdened with a portion of the public Turkish debt. Roumania was declared independent, subject to the same conditions as Serbia, and an alteration was made in the territorial limits of the principality.

Roumania was declared a monarchy in 1881, and Serbia in 1882; so that these may now be said to have discarded their former character as "half sovereign States."

THE UNITED STATES OF AMERICA v. M'RAE.

Temp. 1869.

[L. R. 8 Eq. 69.]

Case.] During the American Civil War the Confederate Government and their agents had consigned goods and remitted money to the defendant, who was apparently domiciled in England. The defendant having sold the goods and received

(*mm*) The recent revolution in Roumelia, and its probable union with Bulgaria, afford another illustration of the growing force of the doctrine of nationality, and strike another blow at the theory that princes and diplomatists can parcel out nations at will. This event may aid statesmen in arriving at the conviction, long since en-

tertained by others, that political arrangements, if they are to be permanent, must follow the natural lines of cleavage, or, in other words, must take count of those ties, whether of race, place, language, religion, or common past and traditions, which go to make up a nation.

the sale moneys, a suit for an account was, after the suppression of the rebellion, instituted against him by the United States Government in the English Courts. The defendant put in no answer, and simply left the plaintiffs to make out their title to relief. James, V.-C., asked if the plaintiffs were willing to have the account taken as it would be taken between the Confederate Government on the one hand and the defendant on the other. The plaintiffs declined to accept the decree in any form which would recognize the authority of the belligerent States or involve any privity with their agent.

Judgment.] The V.-C., in giving judgment, stated that he would deal with the case as if the plaintiffs had been the Government of India, and the defendant an agent of insurrectionists there. What was at the outbreak of the rebellion the public property of the plaintiffs would still continue their property, and if at the end of the rebellion any such property capable of being identified could be traced to any person, the rightful owners would be entitled to apply for restitution. But moneys voluntarily contributed to the rebellion could not be recovered as moneys had and received to the use of the lawful Government. With regard to property taken by force from innocent persons the right of possession would still remain in them. The learned V.-C. expressed an opinion that it was clear public universal law that any Government *de facto* succeeding another, succeeded to all the public property of the displaced power. Any such public property would, on the success of the new or restored power, *ipso facto* vest in such power, and the latter would have the right to call to account any agent, debtor or accountant to or of the persons who had exercised the authority of the Government. But the right was a right of succession, a right of representation; it was not a right paramount, but was derived through the suppressed authority, and could only be enforced in the same way and to the same extent and subject to the same correlative obligations and rights as if that authority was seeking to enforce it. Assuming this to be true, it was not open to the plaintiffs to claim from the agent, and at

the same time repudiate all privity with him and his former principals. The learned V.-C. expressed himself satisfied that the plaintiffs' claim, as they had framed it, was based on their paramount title to what they alleged to be their own property, in respect of which they sought to treat the possession of the defendants as the possession of the agent of public plunderers, and in this part of the case the proceedings must wholly fail. There was no evidence that any moneys or goods of the plaintiffs (*i.e.*, of the plaintiffs in their own right, as distinguished from their right as successors of the Government which had been suppressed,) had ever reached the hands of the defendant, or that there were in his hands on or after the suppression of the rebellion any public moneys or goods which had become vested in the plaintiffs. On these grounds the suit was dismissed with costs.

The United States of America v. M'Rae, L. R. 8 Eq. 69.

Where a colony or province secedes or endeavours to secede from the State of which it has hitherto formed a part, various questions may arise for the consideration of other States and their tribunals. Omitting for the present the question of recognition of belligerency (*n*), two other questions present themselves: (1), assuming the revolt to be successful, when and with what consequences are other States bound or entitled to recognize the independence of the new State? (2), assuming that the parent State re-establishes its authority, how far does it succeed to the rights or responsibilities of the government overthrown?

With regard to the recognition of independence, Heffter suggests that this cannot be admitted until either the parent State itself recognizes the new order of things after having been indemnified, or, failing this, until the recovery of its ancient rights has become an impossibility (*o*). Other writers suggest as the condition of recognition, that the new State must be *de facto* independent, that it must be capable of maintaining relations of peace and war, and lastly that the parent State must have relinquished active efforts to re-establish its authority. Thus, in his

(*n*) See p. 189, *infra*.

(*o*) Heffter, *Europäisches Völkerrecht*, § 23.

'Letters on International Law,' Historicus says: "As far as any practical rule can be deduced from historical examples, it seems to be this. When a sovereign State, from exhaustion or any other cause, has virtually and substantially abandoned the struggle for supremacy, it has no right to complain if a foreign State treat the independence of its former subjects as *de facto* established, nor can it prolong its sovereignty by a mere paper assertion of right. When, on the other hand, the contest is not absolutely or permanently decided, a recognition of the inchoate independence of the insurgents by a foreign State is a hostile act towards the sovereign State, which the latter is entitled to resent as a breach of neutrality and friendship" (p).

Assuming that the revolted province or State establishes its independence, it does not succeed to any of the obligations of the parent State, which are of a personal character, such as treaties of alliance or succession, but it does succeed to such obligations as possess a local character. Some illustration of these principles may be found in the rules relating to the apportionment of State debts. If the debt was wholly secured on the local revenues of the province which has succeeded in establishing its independence, the whole liability passes to the new State. If the debt was secured on special revenues partly derived from the seceding province, the latter becomes liable *pro rata*. For the general debts of the parent State, on the other hand, the new State is not liable, except in virtue of some special arrangement.

We have now to consider the position where the parent State, instead of succumbing, succeeds in re-establishing its authority. Here the question is generally only one of succession to right, and not of succession to liability (q). Debts and liabilities incurred by a rebel belligerent government have uniformly been repudiated. There are, however, certain rights, both proprietary and contractual, to which the parent State may lay claim. The principle suggested by the case of *The United States v. M'Rae*, and similar cases is, that the parent State, in such case, succeeds to all proprietary and other rights which were previously inherent in any rival government "in its character as government." This, however, is only a right of succession, and is subject to any lawful claims which neutrals holding such property may have against it. Subject to this, a neutral agent cannot resist the claim of the new government on the ground of its want of privity in title with that by which he was employed. In *The King of the Two Sicilies v. Wilcox* (1 Sim. N. S. 301), it appeared

(p) Letters on International Law, p. 9 (by Sir W. Vernon Harcourt).

(q) This statement, perhaps, needs to be modified to this extent; viz., that

the succession to a right sometimes involves an incidental obligation, as in the case of *U. S. v. Prioleau*. See p. 13.

that from March, 1848, to April, 1849, the Government of Sicily had been usurped by certain Sicilian subjects, and that the usurping government while in power had, through its agents in this country, entered into contracts for the purchase of two steamships. One of these had been delivered to the insurgents, but the other remained in this country ; and on his restoration to power, the King of Sicily commenced proceedings to recover the latter. The case came before the Court on the plaintiff's application for production of documents ; this was resisted on two grounds—1st, because the defendants alleged that they held the documents as trustees for the persons by whom they were entrusted with the money ; and 2ndly, because as to certain of the documents their production would subject the defendants to criminal proceedings in Sicily. The Vice-Chancellor held that neither objection was tenable. He remarked that every government in its dealings with others necessarily partook in many respects of the character of a corporation. It must of necessity be treated as a body having perpetual succession. Those who, as constituting the government, stood in the relation of *cestuis que trust* or of principals towards the defendants, ceased to fill that character when they ceased to be members of the government. The executive government being then at an end, the defendants had either ceased to fill the character of trustees or agents at all, or they had become trustees or agents for the plaintiff as the person then in possession of the supreme authority. He accordingly held that the plaintiff was entitled to an order for production.

On the other hand, in the case of *The U. S. v. Prioleau* (35 L. J. Ch. N. S. 7), it was held by Wood, V.C., that the U. S. in claiming certain parcels of cotton of the value of 40,000*l.*, which had been deposited with the defendant by the Confederate Government as security for a contract entered into between the parties, must take the cotton subject to the defendant's lien on the agreement. The V. C. remarked, that Prioleau being a naturalized British subject had a perfect right to deal with the *de facto* government. The case could not be compared to that of a person taking the property of another with knowledge of the rights of that other, as suggested by counsel for the plaintiffs. Such a principle could not be applied to international cases of this description, for if it could, there would be no possibility during the existence of a government *de facto* of any person dealing with that government in any part of the world. Subjects who treated with the existing government had every right which the government *de facto* could give them ; and the succeeding government could not assert any right as against the contracts which had been entered into by the government *de facto* ; they must succeed in every respect to the property as they found it, and subject to all the conditions and liabilities to which it was subject.

*STATE JURISDICTION.***THE QUEEN v. KEYN.***Temp. 1876.*

[L. R. 2 Exch. Div. 63.]

Case.] The prisoner, Ferdinand Keyn, was indicted at the Central Criminal Court for the manslaughter of Jessie Dorcas Young. The deceased in February, 1876, was a passenger on board the British steamer "Strathclyde," on a voyage from London to Bombay. When off Dover the "Strathclyde" was run into by the "Franconia," a German vessel under the command of the prisoner, a German subject. The "Strathclyde" was sunk, and the deceased, together with several others of the passengers and crew, was drowned. It was alleged and found that the collision was due to the negligence of the prisoner as captain of the "Franconia." The point at which the collision occurred was $1\frac{2}{3}$ miles from Dover pierhead and within $2\frac{1}{2}$ miles from Dover beach. The "Franconia" having put into an English port, Keyn was indicted for manslaughter at the Central Criminal Court, and the facts being such as amounted in English law to manslaughter, he was found guilty; but the question whether the Court had jurisdiction to try the case was reserved for determination by the Court for the Consideration of Crown Cases Reserved.

The legality of the conviction was contested on the ground that the accused was a foreigner commanding a foreign vessel on a voyage from one foreign port to another, that the offence was committed on the high seas, and that the accused was consequently not amenable to the jurisdiction of the English Courts. It appeared that criminal jurisdiction at Common Law was originally distributed between two tribunals. The Courts of Oyer and Terminer took cognizance of offences committed within the body of a county; the Court of the Lord High

Admiral of those committed on the sea. Each Court claimed concurrent jurisdiction over offences committed on rivers or arms of the sea within the body of a county. By 15 Rich. II. c. 3, the Admiral's jurisdiction was limited to cases of death or mayhem "done in great ships being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh unto the sea"; this in addition, however, to his jurisdiction over "a thing done upon the sea." By 28 Hen. VIII. c. 15, all treasons, felonies, robberies, murders and confederacies committed on or upon the sea, or in any haven, creek, river or place where the Admiral had jurisdiction, were to be tried in such shires and places as might be limited in the king's commission, this to be directed for the same in like form and condition as for offences committed on land. The result of this statute was to transfer jurisdiction in such cases to the commissioners of Oyer and Terminer, amongst whom was included the Judge of the Admiralty Court, and to make such offences triable by the ordinary process. By 39 Geo. III. c. 87, the provisions of 28 Hen. VIII. c. 15, were extended to all offences committed on the high seas out of the body of any county. Ultimately by 4 & 5 Will. IV. c. 36, and by 7 & 8 Vict. c. 2, this jurisdiction was vested in the Central Criminal Court and the Judges of Assize. In this manner offences originally within the Admiral's jurisdiction became triable by the ordinary law of the land and before the ordinary Courts. This being so, the question in the present case was whether the jurisdiction originally vested in the Admiral and now vested in the Central Criminal Court and the Judges of Assize included jurisdiction over an offence committed by a foreigner on board a foreign vessel within three miles of the English shore.

Summary of Judgments.] On the argument of this question before the Court for the Consideration of Crown Cases Reserved, the majority of the Court (including Cockburn, C.J., Kelly, C.B., Bramwell, L.J., Lush and Field, JJ., Sir R. Phillimore and Pollock, B.), were of opinion that prior to 28 Hen. VIII. c. 15,

the Admiral had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limit of three miles from the shore of England, and that 28 Hen. VIII. c. 15, and subsequent statutes only transferred to other Courts such jurisdiction as had formerly been vested in the Admiral. Kelly, C.B., and Sir R. Phillimore came to the same conclusion also on the ground that at International Law the power of a nation over the sea within three miles of its coast existed only for certain limited purposes, namely, for the defence and security of the adjacent territory, and Parliament could not consistently with those principles apply English criminal law within those limits.

The judgment of the majority was dissented from by Lord Coleridge, C.J., Brett and Amphlett, L.JJ., and Grove, Denman and Lindley, JJ., on the ground that the sea within three miles of the coast constituted part of the territory of England, that the English criminal law extended over those limits, and that the Admiral formerly had jurisdiction to try offences there committed, although on foreign ships. Coleridge, C.J., and Denman, J., also upheld the jurisdiction of the Court on the further ground that the prisoner's ship having run into a British ship and sunk it and so caused the deceased's death, the offence must be deemed to have been committed on board a British ship.

Judgment of Cockburn, L.C.J.] In his judgment the Lord Chief Justice laid down as a general rule that a subject of one country could not be made amenable to the criminal law of another country except for acts done within the limits of its territory or on board one of its vessels. If the legislature of a particular country thought fit by express enactment to render foreigners subject to its laws with reference to acts committed beyond its territory, it would be incumbent upon the Courts of such country to give effect to such enactment, leaving it to the State to settle the question of International Law with the Governments of other nations. But in default of such specific enactment the accused could not be made

amenable to English law unless he was either within the limits of British territory or on board a British vessel.

As to whether there was any such express rule of English law, it appeared that at Common Law every offence was triable only in the county in which it was committed, the jurors having to be summoned from that county. Bays, gulfs, or estuaries were held to be within the body of the adjacent county ; but along the rest of the coast Common Law jurisdiction only extended to low-water mark. Offences outside these limits were left to the Admiral, as exercising the authority of the sovereign on the high seas ; except that in respect of murder and mayhem committed in ships at the mouths of great rivers a concurrent jurisdiction was given by Statute. By subsequent statutes all criminal jurisdiction formerly belonging to the Court of the Admiral was transferred to Courts of Common Law, but these gave the Courts no greater jurisdiction than the Admiralty originally possessed. After referring to the authorities the Lord Chief Justice held that the Admiral's jurisdiction was never exercised (except in case of piracy) over offences committed on other than British ships.

If, therefore, the accused was to be held amenable to English law, it must be either on the ground that the offence, having been committed within the three-mile limit, must be considered to have been committed within the limits of British territory, over which the State had civil and criminal jurisdiction ; or on the ground that it must be deemed to have been committed on board a British vessel by reason of the death of the deceased having taken place there.

With respect to the three-mile limit, the learned Lord Chief Justice said the doctrine in question amounted to this, that a belt of the sea to a distance of three miles from the coast, though so far a portion of the high seas as to be within the jurisdiction of the Admiral, was yet part of the territory of the realm so far as to make a foreigner within such belt, though on a foreign ship, subject to English law. Originally indeed

sovereignty was claimed by the English Crown over the narrow seas, and a concurrent jurisdiction even beyond this. But such extravagant pretensions on the part of England and other nations had long since ceased, and in no way supported the doctrine of jurisdiction within the three-mile zone, since if it existed at all it would apply to the whole of the surrounding seas.

The Lord Chief Justice then went on to trace the origin and growth of the doctrine of the three-mile limit. After careful examination of the writings of the English, American and Continental publicists (*q*), he came to the conclusion that the suggestion of Bynkershoek that the sea surrounding the coast to the extent of cannon range should be regarded as belonging to the State, had been almost universally adopted by the subsequent writers on International Law; but he added that great difference of opinion existed as to the exact distance, and as to the still more essential question of the nature and degree of sovereignty. As to distance, the majority adopted the three-mile zone, others more consistently applied the principle on which the doctrine really rested, viz., the range of cannon shot. On the question of the nature of the sovereignty still greater divergence of opinion existed, some writers contending for absolute dominion and a right of excluding foreign vessels even from passage; others contending for dominion, but subject to a *jus in re aliena* on the part of other nations to pass and repass; whilst others denied that there was any right of property, but conceded a more or less extensive jurisdiction. Even as to this jurisdiction, views differed; some limiting it to purposes of safety and police, others extending it to the enforcement of revenue and fishery laws, others distinguishing between a passing ship and a commorant ship in the matter of jurisdiction. None of these writers, however, went to the length of asserting the liability of a foreigner in a foreign ship to the criminal law of the local State. The effect of the general con-

(*q*) These should if possible be referred to, pp. 176 to 191 of the report.

sensus as to some part of the sea being subject to jurisdiction for some purpose, was entirely negated by the complete divergence of opinion as to the practical application of the principle.

As to the contention that the sea to the extent of three miles from the coast formed part of the realm of England, the learned Lord Chief Justice, after reviewing the authorities, held that the littoral sea beyond low-water mark did not originally form part of the territory of the realm. The statements of ancient authorities on this subject were manifestly based on the doctrine that the narrow seas were part of the realm of England, a doctrine which was long since exploded. This doctrine could not now be evoked for the purpose of applying it within a more limited sphere. If it failed at all, the whole doctrine failed.

If, as it appeared to him, the littoral sea beyond low-water mark did not originally form part of the territory of the realm, how and when did it become so? If it had become so in fact, this result must be ascribed to the writers on International Law. But even if these had been entirely unanimous on the subject, they could not make law apart from the assent of civilized nations. In addition to this, even if assent on the part of other nations was clearly proved, yet it was doubtful if such principles, amounting in fact to a new law, could be applied by a municipal court here in default of an Act of Parliament.

The question being then not one of theoretical opinion but of fact, what evidence, either in the shape of treaties or usage, was there of such a principle? As regards treaties, the rule that the sea surrounding the coast was to be treated as adjacent territory in such a way as to give the State dominion together with criminal and civil jurisdiction over passing vessels of other nations, had never been made the subject matter of any treaty, or as matter of acknowledged right, formed the basis of any treaty, or even been the subject of diplomatic discussion. It had been entirely the creation of writers on International Law. The treaties referred to on the subject related to two matters only, namely the observance

of the rights and obligations of neutrality, and the exclusive right of fishery. The distance of three miles had been adopted in those treaties not as matter of existing right, but as matter of mutual concession and convention. As to usages, the only usages found to exist were connected with navigation, revenue, fishery, or neutrality laws. There appeared to be no usage warranting the application of the general law to foreigners on the littoral sea. It was the first time that a Court of Justice had been called upon to apply the criminal law of the country to such a case as the present. It was quite possible that, in view of the opinions of writers on public law, if a nation chose by municipal law to subject foreigners within these limits to its jurisdiction, this would be acquiesced in by other nations; the principle would then be attributable to such acquiescence. If such a rule were adopted it would, without doubt, be binding on the municipal tribunals; but the power of Parliament to legislate could not be treated as making up for the want of actual legislation giving the Courts authority to apply such a rule of criminal law in such a case.

The learned Lord Chief Justice then proceeded to consider the statutes relating to the sea by which foreigners might be affected. Of these some had no reference to the three-mile zone, others had such reference. Dealing with statutory enactments relating to foreigners within the three-mile zone, he found that these were confined to violation of neutral duties or breaches of the revenue or fishery laws, and that, apart from these, there had been no assertion of legislative authority in the general application of the penal law to foreigners within the three-mile zone. It further appeared that when asserting its power to legislate with reference to foreigners within the three-mile zone, Parliament had deemed it necessary to express such intention in specific terms. This surely was an indication that a Court of Justice could not apply such a rule without the authority of specific legislation. After reviewing the decisions which had been quoted in connection with the subject, he remarked that

most of these seemed to have arisen on the construction of Acts of Parliament, but in none was the question raised, how far without an Act of Parliament could local law be made applicable to foreigners within the three-mile zone.

Taken together, decisions and dicta showed that the views and opinions of the foreign jurists as to a territorial sea had been received with favour by eminent judicial authorities of this country, and that the doctrine respecting it had been admitted in the construction of statutory enactments; but none of them established or even suggested that independently of statute the criminal law of England was applicable to the foreigner navigating any part of its shores. Having regard to all these facts, viz.:—that all pretensions to sovereignty in the narrow seas had been long since abandoned—that the statements made by the jurists were uncertain and indefinite both as to the extent of space and nature of the sovereignty claimed over the littoral sea—that such penal jurisdiction had never been conceded by other nations or acquiesced in except for violation of neutrality or breach of revenue or fishery law—that neither in its legislation as to shipping nor as to criminal jurisdiction had Parliament thought fit to assume sovereignty within the three-mile zone in respect to foreigners—that wherever a foreigner had been rendered amenable to English law this had been done by express and specific legislation—in view of these facts and of the total absence of all precedent in favour of the contention, the learned Lord Chief Justice laid down that the Court would not be justified in holding the offence to be punishable by the law of England, especially as in so holding it must declare the whole body of the penal law to be applicable to foreigners passing our shores in foreign vessels on their way to foreign ports.

Another contention urged on behalf of the Crown was, that, the death having taken place on board a British ship, the offence must be deemed to have been committed within the jurisdiction of the British Courts. As to this the learned Lord Chief Justice expressed an opinion that, if the defendant

had purposely run into the "Strathclyde," it might have been held that the killing of the deceased took place where the death occurred, and consequently that the act had been committed on board a British ship; but he added that where death arose from the running down of another ship through negligence, and where consequently the negligence might be said to be confined to the improper navigation of the ship occasioning the mischief, he did not see how the party guilty of such negligence could be said to be either actually or constructively in the ship on which the death took place.

He was, therefore, of opinion that there was no jurisdiction to try the defendant, and that the conviction was illegal and should be quashed (r).

The Queen v. Keyn, L. R. 2 Exch. Div. 63.

Extracts from the judgment of Cockburn, C.J., have been given at some length, not only as containing a clear exposition of some important principles of International Law, but also as illustrating very forcibly the attitude taken up by the English Courts towards principles laid down by the text writers, but not supported by treaty, statute, or decided cases.

The jurisdiction denied to exist in *R. v. Keyn* was given by the Territorial Waters Jurisdiction Act, 41 & 42 Vict. c. 73, which enacted that an offence committed by any person within territorial waters should be an offence within the Admiral's jurisdiction, although committed on a foreign ship. But proceedings under the Act against a foreigner, other than preliminary proceedings before a justice of the peace, are not to be instituted in the United Kingdom, except with the consent of a Secretary of State, and on his certificate that the institution of proceedings is expedient, or in the colonies except with the consent of the Governor, and on a similar certificate.

The Act does not affect jurisdiction by the law of nations, or any jurisdiction conferred by statute or existing in relation to foreign ships or persons on board them, nor does it affect trial of piracy.

The term "territorial waters" is defined as such part of the sea adjacent to the United Kingdom or other part of the British dominions as is deemed by International Law within the territorial jurisdiction, and for the purposes of the Act any part of the open sea within one league from the coast, measured from low-water mark.

(r) The judgment of Lindley, J., of the contrary view. should be referred to for an exposition

EXCURSUS I.—RIVERS AND INTEROCEANIC CANALS.

APART from Treaty and Convention the general principles governing the ownership and use of navigable rivers seem to be :—(1.) Where a navigable river lies wholly within the territory of one State, dominion and user belong exclusively to that State. (2.) Where a river constitutes the boundary between two States, the frontier line is the middle of the channel or thalweg ; but there is a presumption that both States have a right of user or navigation (rr). (3.) Where a navigable river passes through or drains the territory of several States, it is commonly laid down that, although each State retains its sovereignty and dominion over such portion as lies within its territory, yet there exists an imperfect right on the part of the inhabitants of the upper banks, and probably on the part of all riparian owners, to the free navigation of the river. The existence of such a right, however, is frequently denied ; and at the most it cannot be considered more than a right of comity, though it gains in strength where the river affords the only means of access to the sea.

But though, "*stricto jure*," each State could thus appropriate and regulate waters wholly within its territory, the use and navigation of most of the important navigable rivers have come to be regulated by Treaty or Convention. So far as European rivers go, it was provided as early as 1814 and 1815 by the Treaties of Paris and Vienna :—(1) that the navigation of rivers bordering on or passing through several States should be free to their mouths ; (2) that subject to this freedom of navigation, States might exercise rights of sovereignty over rivers traversing their territories, but storehouses and stations for transshipment were not to be established, nor should those already in existence be preserved, except so far as they were of use for navigation or commerce ; (3) that navigation dues should be independent of the quality and nature of the goods transported, and should not exceed the maximum fixed in June, 1815 ; (4) that the police regulations relating to navigation should be uniform, and should not be changed by one State without the consent of others.

 THE RIVER RHINE.

In 1826 a dispute as to the navigation of the Rhine arose between Germany and Holland. In the Treaty of Paris, 1814, provisions had been inserted for securing the free navigation of the river to upper

(rr) Heffter, *Europäisches Völkerrecht*, § 77.

riparian States. These provisions were confirmed by the Congress of Vienna, 1815. In spite of this the Dutch Government later claimed the right of imposing duties on vessels navigating the lower parts of the river. It appeared that above Nimeguen the river divided into three branches—the Waal, the Leck and the Yssel, all these being navigable. The Dutch Government contended that these were artificial mouths, that the real Rhine was a small stream leaving the Leck at Wyck, and that it was only this part of the river that the Powers were entitled to use under the provisions of the Congress of Vienna. The matter was at first compromised, the Dutch Government conceding the right of navigation in regard to the Leck. The Dutch Government afterwards consented to the substitution of the Waal for the Leck, this former being better adapted for navigation.

Subsequently Holland contended that the Waal terminated at Gorcum, and that the stream below that point, including the mouth of the Meuse, was a mouth of the sea enclosed within Dutch territory, and subject to any imposts and regulations that the Dutch might establish. In this view Holland was supported by France and Baden alone. It was in reply pointed out that by the treaty additional territory had been granted to Holland, and the grant had been combined with the freedom of the navigation of the river to the sea; that the right of navigation drew with it by implication the right to use the different waters connecting it with the sea, and that the right set up by Holland to levy unlimited tolls on the chief passage into the sea, rendered useless the right of navigation in Dutch territory.

The matter was ultimately settled by the Convention of Mayence of the 31st of March, 1831, between all the riparian States of the Rhine. Thereby the navigation of the river was declared free from where it becomes navigable to the sea (*bis in die See*), and Holland stipulated to indicate other watercourses for the navigation of the riparian States equal in convenience to those open to its own subjects, in case the passage by Briel and Helvoetsluys should become unnavigable through natural or artificial causes.

By a provision of the Treaty of 1815, which is still in force, it is provided that, in case of war, the collection of customs on the Rhine shall continue uninterrupted, without any obstacle being thrown in the way by either belligerent.

THE DANUBE.

By the Treaty of Paris of the 30th of March, 1856, it was agreed that principles similar to those described above should apply to the Danube, and should be taken for the future as part of the public law

of Europe. The navigation of the Danube was to be subject to no impost not expressly provided for by the Treaty ; the rules of police and quarantine were to favour navigation as much as possible ; arrangements were made for the appointment of a European commission for the purpose of clearing the river from all obstacles and improving the navigation of the lower part of the river and the adjoining sea, permission being given to levy tolls for the purpose of meeting the expenses of the works. Another commission was appointed for the purpose of drawing up rules for the navigation of the river, and of making provision for the establishment of a river police. This commission was further empowered to make arrangements for the removal of existing tolls, to execute all necessary works required in relation to the river, and, after the dissolution of the European commission, to maintain the navigation of the mouths of the river and the adjoining sea. Each of the parties to the treaty was to be at liberty to station two small boats at the mouth of the river, in order to see that the regulations were carried into effect. By Treaty of the 13th of March, 1871, provision was made for the neutrality of the river works, but it was stipulated that Turkey should still have the right to send ships of war up the river. From this it would seem that the navigation of the Danube, unlike that of the Rhine, is still liable to be impeded by belligerent operations.

DISPUTE AS TO THE MISSISSIPPI.

In 1763, by the Treaty of Paris between Great Britain, France, and Spain, the right of navigating the Mississippi was secured to Great Britain. Shortly afterwards Louisiana was ceded by France to Spain, and in 1783 Florida was retroceded to the latter country by Great Britain. In the same year, at the time of the acknowledgment of American Independence, the navigation of the river was secured to both Great Britain and the United States. Spain subsequently claimed the exclusive right of navigating the river from the southern boundary of the United States. This claim was resisted by the United States, who set up the right to participate in the navigation of the river, and urged that access to the ocean was free to all men, that rivers were free to all riparian inhabitants, and that writers on the Law of Nations agreed that the innocent passage of a river was the natural right of all the inhabitants of the upper banks. The dispute was terminated by the Treaty of San Lorenzo el Real of 1795, whereby Spain agreed that the navigation of the river in its whole breadth and its whole length, from its source to the ocean, should be free to the citizens of the United States. Subsequently Florida and Louisiana passed into the hands of the United States, who thus acquired control over the whole river.

DISPUTE AS TO THE ST. LAWRENCE.

In 1826 a controversy arose between Great Britain and the United States on the subject of the navigation of the St. Lawrence River. The United States claimed the full and free navigation of the lower part of the river as a natural right. It was urged on behalf of the United States that by the Treaty of 1794 the United States were allowed to import goods through Canada, subject to similar duties to those payable by British subjects; that the right of the United States to navigate the river had been recognized by the statutes 3 Geo. IV. c. 44 and 3 Geo. IV. c. 119; and lastly that the navigation of the river had been opened up to the United States at the same time as to Great Britain. It was further contended, upon the authority of Vattel and Grotius, that the right of passage was a natural right, and recognized as such by the Law of Nations.

Great Britain replied that the claim by one State to navigate the territorial waters of another State could only rest on convention. The authority of Puffendorf was opposed to such demands on the ground that if a nation permitted them it would be overflowed with foreigners, and that a nation was justified in reserving to its subjects the profits that would go to foreigners if free navigation was allowed. It was also urged that no treaties had recognized a natural and independent right to navigate rivers; that the provisions of the Treaty of Vienna tended to show that there was no such right, and that a right to free navigation could only be established by convention; that even if the United States had acquired the right to navigate the river in question at the same time as Great Britain, that right had been taken away by the Treaty of American Independence; and finally that the third article of the Treaty of Commerce between the two countries showed that Great Britain had the power of excluding foreign vessels from that part of the river which was entirely within British dominion.

The dispute was finally terminated by the Treaty of Washington of 1871, which gave to the United States the right of freely navigating the river, subject to such laws of Great Britain and Canada as were not inconsistent with free navigation.

THE SUEZ CANAL.

In 1854 a concession was granted by the Viceroy of Egypt to M. Ferdinand de Lesseps, authorizing him to construct a ship canal between the Mediterranean and the Red Seas. The concession was renewed in 1856. A company was formed in 1858 for the construction of the canal, the shares of which were originally held, partly

by French citizens, partly by the Khedive of Egypt. The canal was finally constructed, and opened for traffic in 1867, the works being carried out under the superintendence of French engineers. In 1875 the British Government purchased from the Khedive the shares possessed by him, one of the motives of the purchase being to obtain some control over the management of the canal. Recently an arrangement has been come to between M. de Lesseps and some leading representatives of British shipping, by which the British element in the Directorate has been strengthened.

Some discussion has occurred as to the international position of the canal, and also as to its neutralization in time of war.

The canal itself occupies a peculiar position. It is an artificial waterway; it lies wholly within Egyptian territory, Egypt itself being a tributary State of the Turkish Empire; as a mercantile institution it is the property of a French company; whilst by far the largest proportion of vessels using it are British. It is contended by some, that, in virtue of the principle established by the Congress of Vienna in 1815, all States have a right of unimpeded navigation, subject to the payment of mercantile dues. Some English writers, whilst not admitting that the principle of 1815 applies to the navigation of an artificial waterway, yet claim for Great Britain a right of passage, and, if need be, a right of control, on the ground of its essentiality to her as a maritime route to India.

With regard to the question of neutralization, it seems that at present the neutrality of the canal is dependent merely on a declaration of the Viceroy. Under these circumstances, to contend that the canal has already become a neutralized waterway, would involve an entire misapprehension of the true conditions and meaning of neutralization. In 1877 M. de Lesseps submitted to the British Government a project for securing the neutrality of the canal, in the form of an international agreement. The British Government was unable to recommend the project for the acceptance of other Powers, but stated that an intimation had been given to the Russian Ambassador (Russia being then at war with Turkey) that any attempt to blockade or otherwise interfere with the canal or its approaches would be regarded as a menace to India, and a grave injury to the commerce of the world. It was also stated that the British Government would not permit the canal to be made the scene of any warlike operations. In 1882, however, in the course of the British military operations in Egypt, the Canal was occupied by the British fleet, and traffic suspended for twenty-four hours. On the 17th of March, 1885, the principal European Powers agreed to appoint a commission for the purpose of settling a convention for the establishment of the free navigation of the canal. With the appointment of this commission the present history of the canal comes to a conclusion.

Mr. T. J. Lawrence in a recent publication (s) has suggested that, with the view of settling its international position for the future, a strip of territory bordering on the canal, and extending to a considerable distance on either side, should be neutralized, and converted into a new State, under the government of an hereditary prince, appointed in the first instance by the Great Powers; that the Great Powers should undertake not to attack it, and should guarantee its safety against external foes; this guarantee being given on condition that the new State pledges itself not to make war, except in defence of its frontier, not to allow any obstacle to be placed in the way of the free navigation of the canal, and further undertakes to maintain the waterway in good order, having power to levy reasonable tolls for the expense of such maintenance on all ships passing through the canal. The course of political events, however, suggests the probability that the true solution of the difficulty will be found in the neutralization of the whole of Egypt under the guarantee of the Great Powers.

THE PANAMA CANAL.

Another project in some respects similar to the Suez Canal, is the proposed ship canal through the Isthmus of Panama, between the Atlantic and Pacific Oceans.

On the 19th of April, 1850, in contemplation of a similar project, which was, however, to follow a different route to that of the present canal, a convention known as the Clayton-Bulwer Treaty was entered into between Great Britain and the United States to the following effect:—(1.) Neither Power should obtain or maintain exclusive control over the canal, or erect or maintain any fortification in the vicinity, or occupy, fortify, colonise, or assume any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America. (2.) In case of war between the parties, vessels of either party traversing the canal should be exempt from blockade, detention, or capture. (3.) Protection should be afforded to any persons undertaking the construction of the canal. (4.) Each party undertook to endeavour to induce other States having jurisdiction over territory to be traversed by the canal to facilitate its construction, and also to procure a free port at each end of the canal. (5.) Each party guaranteed the neutrality of the canal. (6.) Each party agreed to invite other States to enter into similar stipulations with them, and to enter into treaties with such of the Central American States as they might deem advisable for carrying out the design of the con-

(s) *Essays on some Disputed Questions of Modern International Law*, p. 37.

vention. (7.) Each party also agreed to extend its protection by treaty to any other practicable communications, whether by canal or railway, across the Isthmus, and especially to the interoceanic communications should the same prove to be practicable, whether by canal or railway, which were then proposed to be established by way of Tehuantepec or Panama.

The original scheme contemplated by the convention fell through, and it was not until 1880 that any steps were taken to secure the construction of the present canal. In this year M. de Lesseps having obtained the necessary concessions, formed a company for the purpose. The canal was actually commenced in 1881, and is now in the course of construction.

Some discussion has lately taken place between Great Britain and the United States with reference to this Convention, and the future position of the Canal. The United States have proposed the modification of the Convention with the view to the abrogation of the joint protectorate over the canal, and the substitution of the political control over it of the United States alone; it is also proposed that the United States should acquire the right of fortifying the canal; that a neutral zone should be laid down around the entrance to the canal on either side; that in time of peace the canal should be open to the war vessels of all nations, but that in time of war, apart from its use for the defence of the country, where it is situate, the canal should be closed to all war vessels. It has also been urged by the United States that the Clayton-Bulwer Treaty is no longer binding, inasmuch as it contemplated a canal which was never actually constructed, and inasmuch as Great Britain subsequently acquired a colony in the place of a settlement at Belise in contravention of Article 1 of the Convention. In reply, it has been urged by Great Britain that she has important interests in the locality; that the subject is also one affecting the whole civilized world; that the Convention was to extend to any future canal or canals which might be constructed; that British Honduras, where the colony referred to is situate, was expressly excepted from the convention; and that the United States in fact expressed their acquiescence in the possession of the colony by Great Britain (*t*). It is also pointed out by Mr. T. J. Lawrence (*tt*), that although one Power might exercise a protectorate over the canal, it is inconsistent with the meaning of "neutralization" as understood in International Law, that such a condition should be guaranteed by one Power alone.

(*t*) Parliamentary Papers, United States, No. 1, 1884.

(*tt*) A very clear account of the controversy and a careful analysis of the

American contention, will be found in Mr. T. J. Lawrence's work mentioned above, Essay III.

*PUBLIC VESSELS.***THE "PARLEMENT BELGE."***Temp.* 1880.

[L. R. 5 PROB. DIV. 197.]

Case.] In this case it appeared that a collision had taken place in Dover Harbour, between the steam tug "Daring" and the "Parlement Belge." Proceedings were thereupon instituted by the owners of the "Daring" against the "Parlement Belge" in the English Court of Admiralty. A protest was filed asserting that the Court had no jurisdiction to entertain the suit. The protest alleged that the "Parlement Belge" was a mail packet running between Ostend and Dover, the property of the King of Belgium, and was a public vessel of the sovereign and State. In the Lower Court this protest was disallowed.

Judgment.] On appeal to the Supreme Court the first question raised was whether the Court had power to proceed against a ship which though present in this country was at the time the property of a foreign sovereign and a public vessel of the State, it being admitted that the ship was not an armed ship of war, nor employed as part of the military force of the country. As to this the Court laid it down as a principle to be deduced from the authorities that every State declined to exercise territorial jurisdiction over the person of any sovereign or ambassador of any other State or over the public property of any State which was destined to public uses. The second question which the Court had to consider was whether the immunity was not lost by reason of the ship having been used for trading purposes. As to this the Court adopted the principle that if a vessel were declared by the sovereign authority by the usual means to be a public vessel, that declaration could not be enquired into. Moreover in the present case the ship had been mainly used for carrying the mails, and only subserviently for the purposes of trade. The property could

not be denied to be public property, the case was within the terms and the spirit of the rule, and the Court was of opinion that the mere fact of the ship having been used subordinately and partially for trading purposes did not take away the general immunity. The judgment of the Court below disallowing the protest was therefore reversed, and the proceedings against the vessel were dismissed (*u*).

The Parlement Belge, L. R. 5 P. D. 197.

A public vessel is one owned and commissioned by the Government of a sovereign State. The term includes not only ships of war, but unarmed government vessels, store-ships, and transports, but not prizes until condemned and re-commissioned. Proof of character is found in the commission, in the use of flag and pendant, and if need be, in the word of honour of the captain. The decision of the Court in the "*Parlement Belge*" shows that an ancillary use of a public vessel for the purposes of trade will not disentitle her to that character. In the previous case of the "*Charkieh*" (L. R. 4 A. & E. 59, the facts of which will be found on p. 6), Sir R. Phillimore adopted the principle laid down by Bynkershoek, that no proceeding *in rem* could be instituted against the property of a foreign sovereign or his ambassador, if the *res* could in any fair sense be said to be connected with the *jus coronæ* of the sovereign or with the exercise of the functions of his ambassador. But inasmuch as in that case the Khedive had failed to establish his title to the privileges of a sovereign prince, and on the further ground that the "*Charkieh*" was at the time under charter for trading purposes to a British subject, he refused to recognize the claim to immunity from local jurisdiction. It will be seen, however, that the latter principle has been considerably modified by the decision of the Court of Appeal in the "*Parlement Belge*."

(*u*) By Conventions between Great Britain and France it has been agreed that mail steamers of either country shall have the privilege of warships whilst in the ports of the other. See p. 234, *infra*.

"THE EXCHANGE" v. McFADDON.*Temp.* 1812.

[7 CRANCH, 116.]

Case.] In December, 1810, while on a voyage from Baltimore to St. Sebastian, "The Exchange," then the property of two American citizens, was seized by order of the Emperor Napoleon. She was converted into a French man-of-war at Bayonne, being known as "The Balaou." She was subsequently brought into the port of Philadelphia, and proceedings were thereupon instituted against her, with the object of securing her restoration to her former owners. In reply it was contended that the Court had no jurisdiction, the vessel being a public vessel and bearing the commission of a foreign sovereign.

Judgment.] Marshall, C.J., in giving judgment stated that if there were no prohibition, the ports of a friendly nation were considered as open to the public ships of all Powers with whom it was at peace. If there were no treaty on the subject, and the sovereign permitted his ports to remain open to the public ships of foreign friendly Powers, the conclusion seemed irresistible that they entered by his consent. The following difficulty occurred on the subject: treaties providing for the case of public vessels provide in like manner for private vessels, and when public ships entered a port under a general licence implied from the absence of prohibition it might be urged that they were in the same condition with merchant vessels entering for trade purposes, and like the latter became subject to the local jurisdiction. But it appeared to the Court that a clear distinction was in such cases to be drawn between the rights accorded to private trading vessels and those accorded to public armed ships. A public armed ship constituted a part of the military force of her nation, acted under the immediate and direct command of the sovereign, and was employed by him in national objects. Interference could not take place

without affecting his power and his dignity. The implied licence therefore under which such a vessel entered a friendly port might reasonably be construed, and, as it seemed to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claimed the rights of hospitality. He, therefore, concluded that it was an undoubted principle of public law that a national ship of war entering the port of a friendly Power did so under an implied condition of exemption from jurisdiction. Without doubt the sovereign of the place could destroy the implication, but until this was done in a manner not to be misunderstood, the sovereign could not be considered as having imparted to the ordinary tribunals a power which it would be a breach of faith to exercise.

As to a contention that it was the duty of the Court to enquire whether the title of the original owners had been extinguished by an act recognized as valid by national or municipal law, the learned Judge held that the ship must be considered to have come into American territory under an implied promise that while necessarily within it and demeaning herself in a friendly manner she should be exempt from the jurisdiction of the country.

The proceedings against the vessel were accordingly dismissed.

The Exchange v. McFaddon, 7 Cranch, 116.

A public vessel, whilst on the high seas, is subject only to the jurisdiction of her own country, and any interference with her on the part of a foreign State would constitute a serious act of aggression.

Even whilst in the territorial waters or harbours of another State a public vessel is not subject to the local jurisdiction. The vessel herself cannot be seized; payment of salvage cannot be enforced; those on board cannot be arrested.

On the other hand, the public vessel and those on board her ought not wilfully to ignore local rules. Sanitary and harbour rules ought to be observed. Criminals taking refuge on board ought to be given up. Political offenders need not be given up, but should not be

encouraged. If damage is done by the vessel, an inquiry may be held, and the claim may be urged diplomatically. Moreover, if the crew offend on shore and are arrested there, they may be punished, although notice should be given to the captain.

In extreme cases, a public ship may be summarily ordered to leave territorial waters, or even expelled.

THE "CONSTITUTION."

Temp. 1879.

[48 L. J., N. S., P. D. & A. 13.]

Case.] Proceedings were taken to obtain warrants of arrest against the United States frigate "Constitution," and the cargo on board of her, in order to recover compensation for salvage services rendered to her by the steam-tug "Admiral." It appeared that the "Constitution" was an American ship of war, and was in January, 1879, employed in bringing back to America goods belonging to American exhibitors at the Paris Exhibition. The "Constitution" having stranded near Swanage, several tugs and boats came to her assistance, and ultimately she was got off, the steam tug "Admiral" being among the vessels employed in the salvage. The owners of that vessel were offered £200 for salvage service, but deeming this insufficient they instituted proceedings against the "Constitution" in the Admiralty Division of the High Court. At the hearing both the American Legation and the Crown were represented, and the Court was informed that the "Constitution" was a public vessel belonging to the United States, in commission and employed on the public service. The salvors contended, however, that the cargo at least was private property and not entitled to privilege at International Law.

Judgment.] Sir Robert Phillimore in his judgment expressed an opinion that if he were to exercise jurisdiction in the case, he would be doing that for which there existed no direct

precedent; on the contrary he had no doubt as to the general proposition that ships of war belonging to another nation with whom we were at peace, were exempt from the civil jurisdiction of the British Courts, and there were no peculiar circumstances to take the case out of that general proposition. Adverting to the case of the "Charkieh," he stated that he might in his judgment in that case have let drop some expressions capable of giving rise to an impression that a foreign ship of war was liable to arrest, but in that case the question, as it was now raised, had not to be decided. He now felt no doubt that it would be improper to accede to the request of the owner of the steam-tug; nor did he see any distinction between the issue of a warrant in the case of the ship and in the case of the cargo, which was on board of a foreign vessel of war and under the charge of a foreign Government, for public purposes. The proceedings were accordingly dismissed with costs.

The Constitution, 48 L. J., N. S., P. D. & A. 13.

Before the decision in the case of the "Constitution," some doubt seems to have existed as to whether salvage proceedings might not be instituted in the English Court of Admiralty against a public vessel. In the case of the "Charkieh," Sir R. Phillimore had said, "It is by no means clear that a ship of war to which salvage services have been rendered, may not, *jure gentium*, be liable to be proceeded against in the Court of Admiralty for the remuneration due for such services."

In a much earlier case, of the "Prins Frederik" (2 Dods. 451), a Dutch man-of-war, whilst on a voyage from Batavia to the Texel, was partially disabled by stress of weather off the Scilly Isles, and was brought into Mount's Bay with the assistance of the master and crew of a British brig, belonging to the port of Penzance. The "Prins Frederik" was at the time employed in bringing home a cargo of spice belonging to the Dutch Government, and for this purpose some of her guns had been removed. The salvors instituted salvage proceedings against the vessel, on the ground that she had for the time being at least lost the character and privileges of a public vessel, and also on the further ground that such proceedings being *in rem*, and

not against the King of the Netherlands personally, were under any circumstances admissible. According to Lord Campbell, who quoted this case in 1851 (17 Q. B. 212), Lord Stowell took a strong view against the asserted jurisdiction. To avoid difficulty, Lord Stowell caused a representation to be made to the Dutch Government, who consented to his disposing of the matter as arbitrator. Acting under this authority, Lord Stowell awarded the sum of 800*l.* and costs to the salvors.

THE "SITKA."

Temp. 1855.

[OPINIONS OF U. S. ATTORNEYS-GENERAL, VOL. VII., p. 122.]

Case.] In 1856, during the Crimean war, the "Sitka," a Russian ship, was captured by a British man-of-war, and brought into San Francisco with a prize crew on board. An application for a writ of *habeas corpus* was made to the United States Courts on behalf of two prisoners on board for the purpose of trying the validity of their detention. Process was served, and thereupon the commander of the "Sitka" got under way with the prisoners on board.

Opinion.] The opinion of Mr. Cushing, the Attorney-General of the United States, was subsequently taken as to the conduct of the commander of the ship. He pointed out that judicial decisions had settled the point, that except where there had been a violation of its neutrality, as in the case of the "Santissima Trinidad" (*uu*), the Court of a neutral State had no jurisdiction to decide on the validity of a capture made by a belligerent. He also pointed out that the Courts of the United States had adopted almost unequivocally the doctrine that a public ship of war of a foreign sovereign at peace with the United States, coming into her ports and demeaning herself in a friendly manner, was exempt from the jurisdiction of the country.

The Sitka : Opinions of U. S. Att.-Gen., Vol. VII., p. 122.

(*uu*) See p. 187, *infra*.

This case is cited as illustrating the immunity of a public vessel from having process served on board.

In an earlier case, of the "Chesterfield," 1799 (Opinions of U. S. Attorneys-General, Vol. I., p. 87), the question as to whether process could be lawfully served on a British man-of-war lying within the territorial jurisdiction of New York, seems to have been answered in the affirmative. The Attorney-General, Charles Lee, whose opinion was taken, pointed out that by the 23rd Article of the Treaty of London, it was provided that ships of war of each contracting party should be hospitably received in the ports of the other, their officers and crew paying due respect to the laws and government of the country, and that to disobey judicial process or resist it on board the ship, was inconsistent with such due respect. He also pointed out that by an Act of Congress passed on the 5th of June, 1794, and providing that in any case where the process of the United States should be disobeyed by any person having the custody of any war vessel of a foreign prince, it should be lawful for the President of the United States to employ such force as should become necessary, the lawfulness of serving process on board such ship was impliedly admitted. Under these circumstances, he was of opinion that it was lawful to serve process as suggested.

CASE OF JOHN BROWN.

Temp. 1820.

[REPORT OF COMMISSION ON FUGITIVE SLAVES, LXXVI.]

Case.] During the revolt of the Spanish Colonies, 1819—20, John Brown, an Englishman, commanded one of the insurgent vessels. He was taken prisoner by the Spaniards and put into prison at Lima. He subsequently escaped on to the British man-of-war "Tyne." The Spanish authorities demanded his surrender, which was refused by Captain Falcon, the commander of the "Tyne," and Brown was brought home. .

The Secretary of the Admiralty asked Mr. Scott (afterwards Lord Stowell) his opinion on the general question, whether a British subject coming on board a British man-of-

war in a foreign port, in order to escape from civil or criminal process in that port, could claim the protection of the British flag, to which he replied in the negative, and stated that Captain Falcon's act was more to be commended for its humanity and spirit than for its strict legality.

Case of John Brown: Report of Commission on Fugitive Slaves, LXXVI.

A public vessel ought not to harbour a person charged with a non-political crime. If, however, an offender should take refuge on board he cannot be forcibly seized, and if it is desired to obtain his arrest, the only course to pursue is to apply for his surrender diplomatically. Where the captain of a ship in a foreign port allows political refugees on board to make the ship a centre of intrigue, the ship may be forcibly expelled.

FORBES v. COCHRANE.

Temp. 1824.

[2 B. & C. 448.]

Case.] The plaintiff was a British merchant residing in East Florida, where the institution of slavery was recognized by law. In 1815, during war between Great Britain and the United States, Sir A. Cochrane, commander-in-chief of the British fleet on the American station, presumably with the view of hampering the United States authorities and taking advantage of discontent thought to prevail amongst the slaves of the district, issued a proclamation to the effect that any such persons would be received on board the British men-of-war. In consequence of this proclamation a number of the plaintiff's slaves deserted him and escaped to H.M.S. "Terror Bomb." They were afterwards transferred from that ship to the "Albion," commanded by Sir G. Cockburn, the second officer in command on the station, and taken to

Bermuda. After the war the present action was instituted against Sir A. Cochrane and Sir G. Cockburn for damages for detention of the slaves.

Judgment.] It was held that the action could not be maintained; Bayley, J., grounding his judgment on the fact that no *mala fides* on the part of the defendants had been shown, and that they were not bound to take active efforts in delivering up the slaves; Holroyd, J., holding that where a slave escaped into a country where slavery did not prevail there was no right of action against a party who received him there; Best, J., holding that when a slave arrived on a British man-of-war not lying within the waters of East Florida he ceased to be a slave.

Forbes v. Cochrane, 2 B. & C. 448.

With regard to the surrender of fugitive slaves taking refuge on board a public vessel belonging to a nation not recognizing slavery, there is no doubt that these cannot be forcibly recovered. On the other hand, there seems little doubt that if this occurs within the local jurisdiction they ought strictly to be surrendered. To refuse to do so is practically to enforce the law of the country to which the ship belongs in the territorial waters of another State.

The attitude of Great Britain on this question may be gathered from the following instructions, the result of which has been said to be a compromise between International Law and humanity.

On the 5th of December, 1875, the British Government issued instructions on this subject to the following effect:—

1. No fugitive slave is to be received on board a public ship on the high seas before the commander is satisfied that there is some sufficient reason for receiving him.

2. In case a fugitive slave is received, he is to be detained, if he desires to remain, until he is landed in some country or transferred to some other ship where his liberty will be recognized.

3. If, while a ship is in the territorial waters of a State where slavery exists, a person seeks admission into a ship as a fugitive slave, he is not to be admitted unless his life would be in manifest danger if he were not received on board. If received in order to be saved from this danger, he ought not to be allowed to continue on board after the danger is past; but a demand for his surrender

should not be entertained or an examination as to his status entered into.

4. If, while a ship is in the territorial waters of certain States specified in the instructions, admission is claimed by any one on the ground that he has been kept in slavery contrary to treaties with Great Britain, he may be received until the truth of his statement is examined into.

5. A special report is to be made of every case of a fugitive slave seeking refuge on board.

THE "MARIANNA FLORA."

Temp. 1826.

[11 WHEAT. 1.]

Case.] On the 5th of November, 1821, the United States armed schooner "Alligator," whilst on a cruise against pirates and slave traders, came across the Portuguese ship "Marianna Flora," bound on a voyage from Bahia to Lisbon with a cargo. The fact of the "Marianna Flora" having shortened sail, and of her having a vane or flag on her mast somewhat below the head, together with her other manœuvres, induced Lieutenant Stockton, the commander of the "Alligator," to suppose she was in distress or wished for information. He accordingly approached her, whereupon the "Marianna Flora" fired on the "Alligator." The firing was repeated, mutual hostilities took place, which resulted in the surrender of the Portuguese vessel. The Portuguese officers stated that they took the "Alligator" to be a piratical cruiser. Ultimately the "Marianna Flora" was sent by Lieutenant Stockton into Boston and charged with piratical aggression. Upon the hearing the ship was restored by the District Court, and damages awarded for the act of sending her in. On appeal to the Circuit Court the decree for damages was reversed, the ship being restored by consent. An appeal on the question of damages was then taken to the Supreme Court.

Judgment.] The Court expressed an opinion that ships of

war, sailing under the authority of their Government to arrest pirates, could approach vessels for the purpose of ascertaining their real character. On the other hand, no ship in time of peace was bound to lie by and wait the approach of any other ship; she could pursue her voyage in her own way, and use all necessary precautions to avoid any suspected sinister enterprise or hostile attack; she could consider her own safety, but she must take care not to violate the rights of others. She might use any precautions dictated by the prudence or fears of her officers, either as to delay or the progress or course of her voyage, but she was not at liberty to inflict injuries upon other innocent parties simply because of conjectural dangers. After reviewing the facts of the case the Court was of opinion that the conduct of Lieutenant Stockton in approaching and ultimately in taking possession of the "*Marianna Flora*" was entirely justifiable.

With regard to the question of damages it was laid down that if damages were given it would be going a great way towards declaring that an exercise of honest discretion in a case of wrong on the other side ought to draw after it the penalty of damages. Moreover, no decision had been cited in which the capture itself having been justifiable, the subsequent detention for adjudication had ever been punished by damages, and the question before the Court was entirely new. The decision of the Circuit Court on the question of damages was accordingly affirmed.

The Marianna Flora, 11 Wheaton, 1.

It is especially the duty of a public vessel to keep the police of the seas and to put down pirates. For this purpose the public vessel has a right of approach, and, in cases of suspicion, a right of further investigation. The case cited indicates that a public vessel, or, rather, her Government, cannot be rendered liable for consequences accruing from an honest attempt to discharge these duties.

For the rules of comity as to salutes, the reader is referred to Ortolan, *Diplomatie de la Mer*, Book II., Ch. 15.

PRIVATE VESSELS.

THE "ATALANTA."

Temp. 1856.

[OPINIONS OF U. S. ATTORNEYS-GENERAL, VOL. VIII., p. 73.]

Case.] The "Atalanta" was an American merchant vessel. Whilst on a voyage from Marseilles to New York, acts of insubordination and violence occurred on the part of her crew, who compelled the master to return to Marseilles. After the arrival of the ship at that port, on the application of the American Consul, all those concerned in the offence were committed to prison by the local authorities. A few days afterwards, with the consul's assent, a number of them were released, but six were sent on board the "Atalanta" to be taken to the United States for trial. Subsequently, with the knowledge of the consul, but in spite of his protests, the local authorities went on board the "Atalanta," re-took the six men, and again imprisoned them in Marseilles. Some correspondence ensued with reference to the matter, and ultimately the opinion of the United States law officers was taken on the case.

Opinion.] The Attorney-General expressed the opinion that when the ship arrived at Marseilles the master had lawful power, with the aid of the consul, if required, to retain the men on board. The fact that they had committed crimes on board the ship outside the local jurisdiction, for which crimes they were liable to be punished on her reaching New York, did not give the local authorities any right to interfere. If crime had been committed while the ship lay in territorial waters, the local authorities, and they alone, would have had jurisdiction, and might have gone on board to seize the prisoners. The consul acted lawfully when he requested the local authorities to take charge of the prisoners. It was the duty of the local authorities to assist him by the express terms of the convention between the United States and France. The local authorities, however, ought not to have interposed to defeat the lawful con-

finement of any members of the crew by the master on board the ship with the advice and approbation of the consul. The Attorney-General, whilst admitting that the local authorities had jurisdiction in regard to crimes committed on board a merchantman in territorial waters, denied that they had any right to interfere with persons lawfully detained on board the ship by the laws of the country to which she belonged, for a crime committed on the high seas among members of the crew, and not justiciable by the foreign jurisdiction. The doctrine of the public law of Europe on this point was well stated by Riquelme to the following effect: viz., that crimes committed on the high seas, whether on board warships or merchantmen, were to be considered as committed in the territory of the State to which the ship belonged, and that if the ship arrived in port, the jurisdictional right of the territory to which the ship belonged, did not on that account cease. When the crime was committed in territorial waters, in the case of warships the principle of extritoriality protected the ship; in the case of a merchantman, and in the absence of treaty, if the offence affected only the interior discipline of the ship, the local authorities ought to declare themselves incompetent to deal with the case unless their assistance was requested; if otherwise, the territorial jurisdiction was entitled to punish the crime. In the present case, therefore, he could not see on what ground of strict international right the local authorities proceeded.

The Atalanta: Opinions of United States Attorneys-General, Vol. VIII., p. 73.

A merchant ship on the high seas is only subject to the jurisdiction of the State to which she belongs. That State can exercise administrative or criminal jurisdiction in respect of acts committed on board by means of either the authority established on board or the ordinary tribunals of the State: it has full civil jurisdiction over subjects on board, and the same jurisdiction over foreigners as it has when they are in its territory, subject to any exemption existing by the muni-

cial law. The State to which the vessel belongs is also entitled to protect the vessel against interference by other nations, unless she has committed any act of hostility against another State or any act which a belligerent is entitled to restrain, or unless she has escaped on to the high seas after violating the laws of another country while within its waters.

Each State has the right of determining the conditions upon which it will admit foreign merchant ships into its territory, but ships of friendly nations cannot be altogether excluded from commercial relations.

A merchant ship in a foreign port is subject to local laws relating to police and navigation. The vessel and those on board her are also usually held to be subject to the jurisdiction of the local Courts in regard to offences, whether committed on ship or on shore. Both Great Britain and the United States act on this principle. The French Courts, however, refuse to interfere except when the peace of the port is disturbed, where foreigners are concerned or where help is asked. (See the cases of the "Newton" and the "Sally," cited below.) In addition to this in many instances consular conventions have been entered into to the effect that where a merchant vessel of one State enters the waters of another, the consul of the State to which the ship belongs shall have exclusive jurisdiction over matters concerning only the internal order of the vessel, and that the local authorities shall only have jurisdiction where the peace or public order of the locality is disturbed, or persons other than the officers and crew are concerned in the breach of order. Mr. Hall suggests the advisability of principles to this effect being embodied into the Law of Nations (x).

Private vessels are also usually exempted from local jurisdiction if they put into port owing to stress of weather.

THE "NEWTON" AND THE "SALLY."

Temp. 1806.

[ORTOLAN, *DIPLOMATIE DE LA MER*, VOL. I., p. 271, AND *ANNEE J.*, p. 445.]

Case.] In 1806, while the "Newton," an American merchant ship, was in the port of Antwerp, a quarrel took place between two sailors in a boat belonging to the ship. About the same

(x) *International Law*, 2nd edition, p. 183.

time, when the "Sally," also an American merchant ship, was in the port of Marseilles, the mate dangerously wounded one of the crew on the ship. The American consuls claimed exclusive jurisdiction in each case.

Judgment.] The matters came before the Conseil d'Etat, who pronounced in favour of the consuls, on the ground that in respect to offences and torts committed on board a foreign vessel in a French port by one of the officers or crew against another, the rights of the foreign Power ought to be regarded as exclusive concerning the internal discipline of the vessel, in which the local authorities ought not to interfere, unless their protection was demanded, or the peace and tranquillity of the port were disturbed.

The Newton and the Sally, Ortolan, *Diplomatie de la Mer*, Vol. I., p. 271, and *Annexe J.*, p. 445.

These cases are cited as illustrating French law on this subject, Antwerp being at the time under French jurisdiction.

THE "CARLO ALBERTO."

Temp. 1832.

[SIREY'S RECUEIL, VOL. XXXII., PT. 1, p. 578.]

Case.] The "Carlo Alberto," a Sardinian steamship, secretly landed on the French coast the Duchess of Berri and several of her adherents, on the night of the 28th or 29th of April, 1832. The ship had been chartered for Barcelona, the real destination, which was to aid an insurrection against the French Government, having been concealed. In consequence of the landing of the Duchess of Berri an insurrection occurred at Marseilles on the 30th. The ship subsequently put into the port of La Ciotat in distress, and thereupon certain persons on board were arrested by the French authorities.

Judgment.] The lower Court ordered their release on the ground that the arrests were illegal, inasmuch as they were made on a foreign ship, which was to be considered as foreign territory. The decision was reversed by the Cour de Cassation, the Court laying down in its judgment that the privilege established by the Law of Nations in favour of allied or neutral ships ceases when those ships, in contempt of alliance or neutrality, commit acts of hostility; that in such case they become enemies, and must submit to all the consequences of the state of aggression in which they have placed themselves. The ship in the present case was not entitled to the privileges usually accorded to foreign ships putting into port in distress, inasmuch as the vessel had been fitted out to take part in a conspiracy, and had assisted in the execution of a crime which the French authorities ought to investigate. On these grounds, and also on the ground that the vessel was then actually engaged in carrying persons guilty of a conspiracy against the French Government, the Court refused to recognize the exemption contended for.

The Carlo Alberto, Sirey's Recueil, Vol. XXXII.,
Pt. 1, p. 578.

By a humane provision of International Law, vessels putting into a foreign port under stress of weather, are usually exempted from local jurisdiction; but apparently this does not extend to vessels committing offences in violation of the Law of Nations.

THE "CREOLE."*Temp.* 1842.

[PARLIAMENTARY PAPERS, 1843, VOL. LXI.]

Case.] In October, 1841, the "Creole," an American brig, left Hampton Roads for New Orleans, carrying, among other things, a cargo of slaves. On the 7th of November the slaves broke into revolt, murdered a passenger, and wounded the captain, the mate, and two of the crew. They took the brig to Nassau, New Providence. The matter was brought before two magistrates, who ordered the imprisonment of nineteen of the slaves, and set free the others, about 113 in number, on the ground that the moment they landed on British territory they became free.

The United States Government remonstrated against this course, Mr. Webster contending that the ship having been driven into British territory by unavoidable force, those on board ought not to be held within the jurisdiction of the port. To this Lord Ashburton replied that no slave who came within British dominion would ever be restored, and that the matter in dispute was "what constituted coming within British dominions." Without expressing any opinion on this point, he suggested that the matter should be referred to the Home Government. In the result the matter was submitted to arbitration, and an indemnity awarded to the owners of the "Creole" for the loss sustained.

The Creole Case, Parliamentary Papers, 1843,
Vol. LXI.

The result of the "Creole" dispute seems to support the principle that a private vessel putting into a foreign port through compulsion of the crew is in the same position as a vessel entering a foreign port through stress of weather, and is exempted from jurisdiction.

The following cases illustrate respectively the exemption from ordinary liabilities which may accrue from stress of weather or from the performance of acts of generosity towards a crew itself in distress :—

In the case of the “*Fortuna*” (reported 5 C. Rob. 27), during war between Great Britain and Holland, a neutral ship was captured for breach of the blockade of the Weser, and sent home for adjudication. The master set up a defence to the effect that the want of provisions and a strong westerly wind compelled him to make for the Weser. The want of provisions was held no excuse, but Sir Wm. Scott permitted evidence as to the state of the wind to be adduced, and the ship was finally restored.

In the case of the “*Jonge Jacobus Baumann*” (reported 1 C. Rob. 243), it appeared that during war between Great Britain and France this vessel had received on board the crew of the British frigate “*Apollo*,” which had been found in a disabled condition by the “*Jonge Jacobus Baumann*.” Subsequently, the English crew took possession of the vessel, brought her into an English port, and proceeded against the ship on the ground of having enemy’s property on board. The ship was restored, and freight, expenses, private adventure, and a reasonable demurrage was given to the owner, Sir Wm. Scott expressing an opinion in judgment, that if the ship had really belonged to an enemy, the character of enemy itself must have been blotted out by such a service as had been performed.

In the case of the “*Industria*” (cited in Forsyth’s *Cases and Opinions on Constitutional Law*, p. 399), a Spanish ship had put into the port of Black River in Jamaica, in distress, with five slaves on board. The law officers of the Crown expressed an opinion that, assuming the “*Industria*” to have put into Black River in distress, she could not be deemed to have committed any offence against the laws of Great Britain, and was therefore not liable to seizure and confiscation by the civil authorities of the island. They were, however, of opinion that she might have been seized by a duly commissioned British cruiser under the treaty with Spain for the abolition of the slave trade, and carried before a Court of Mixed Commission for adjudication.

FOREIGN SOVEREIGNS.**QUEEN CHRISTINA OF SWEDEN.***Temp. 1657.*

[DE MARTENS, CAUSES CÉLÈBRES, VOL. I., p. 1.]

Case.] In 1654, Christina, Queen of Sweden, abdicated her throne in favour of her cousin Charles Gustavus. After her abdication she travelled in various countries. Amongst other countries she visited France on two occasions, and whilst there was accorded royal honours, and treated by the French Government as a queen regnant. On the occasion of her second visit her chamberlain, Monaldeschi, whom she accused of treason, was put to death by her orders. The question of amenability to French jurisdiction having thus arisen, the French jurists expressed an opinion that the Queen, being an independent sovereign and being in France with the permission of the King, it was not competent to refuse her the right of sovereignty over her subjects, and that all persons in her service and receiving salaries from her must be considered as such, with the exception of those who were subjects of the State where she was resident. In view of this expression of opinion the French authorities refused to interfere.

Queen Christina of Sweden, De Martens, Causes Célèbres,
Vol. I., p. 1.

The privilege of extritoriality extends to sovereigns resident or travelling in other countries than those over which they reign. They enter the country under an implied condition of exemption from local jurisdiction; but this will not warrant their exercising acts of sovereignty, though it would seem that even in this case there is no remedy beyond diplomatic protest, or, at most, expulsion.

This privilege, however, does not extend to sovereigns who have abdicated. In the case of Queen Christina, the Queen would doubtless have been held amenable for her acts to the local tribunals, had

the French Government not debarred itself from taking this course by a previous recognition of the Queen's title to the international rights of a sovereign.

Neither does this exemption from local jurisdiction exist where the sovereign is a subject of the country in which the proceedings are taken, except so far as concerns acts done as sovereign in the country over which he reigns.

In the event of a foreign sovereign committing any acts endangering the safety or public order of the community, it would be lawful to subject his person to restraint, and to compel him to quit the country.

This privilege of extritoriality is shared by ambassadors (*uu*), public vessels (*v*), military forces, when permitted to pass through the territory of another State (*vv*), and by the subjects of Western States when domiciled in certain Eastern countries (*w*).

THE DUKE OF BRUNSWICK v. THE KING OF HANOVER.

Temp. 1844.

[13 L. J. N. S. 107; 11 HOUSE OF LORDS CASES, 1.]

Case.] In this case proceedings had been instituted by the Duke of Brunswick for a declaration that certain instruments appointing the Duke of Cambridge, and afterwards the King of Hanover, his guardians, were void. The defendant, the King of Hanover, was served while temporarily resident in this country, and an application to the Lord Chancellor to relieve him from the process was refused. He thereupon appeared, but an appeal on the question of jurisdiction was taken to the House of Lords.

Judgment.] In the House of Lords it was held that the king's appearance was no waiver of any defence he might have, and that the refusal of the Lord Chancellor to relieve him from process had not the effect of deciding that he was liable to the jurisdiction. It was further held that he was exempt from the jurisdiction of the Courts of this country for acts done by

(*uu*) See p. 66, *infra*.

(*v*) See p. 33, *supra*.

(*vv*) Hall's International Law, 2nd

Edition, pp. 177, 178.

(*w*) Kent's International Law, - by

Abdy, 2nd Edition, p. 202.

him as King of Hanover, but that being a subject of the Queen he was liable to be sued here for acts done by him in such character, and that acts done by him out of the realm, or as to which it was doubtful whether they were done by him as subject or sovereign prince, should be presumed to have been done in the latter capacity. After a review of the facts, it was held that the acts of the defendant under colour or authority of the instruments in question, were not such as would render the defendant liable to be sued in the courts of this country in respect of them.

The Duke of Brunswick v. The King of Hanover, 13
L. J. Ch. N. S. 107 ; 11 Ho. of Lds. Cases, 1.

The principle underlying this case is, that a sovereign as such is not amenable to the jurisdiction of foreign courts. If, however, he is also a subject of a foreign State, he is liable to be sued in its courts in respect of acts done by him as subject ; though acts done out of the jurisdiction will be presumed to have been done by him as sovereign.

DE HABER v. THE QUEEN OF PORTUGAL.

Temp. 1851.

[20 L. J. N. S. Q. B. 488.]

Case.] An action was brought in the Mayor's Court against the Queen of Portugal, as reigning sovereign of that country, to recover a sum of Portuguese money equivalent to 12,136*l*. The plaintiff had deposited this sum with one Francisco Ferreira, of Lisbon, a banker, at a time when civil war prevailed between the legitimate Sovereign and Don Miguel, a pretender to the throne. This sum was paid over by Ferreira to the Portuguese Government under the decree of a Portuguese Court. It was this sum which the plaintiff in the present case sought to recover. After the institution of pro-

ceedings an order was made attaching a sum of money in the hands of one de Brito, of the City of London, belonging to the Queen of Portugal. A rule *nisi* was obtained on behalf of the defendant prohibiting the Mayor's Court from further proceeding with the action.

Judgment.] On the application to make the rule absolute, it was held that the awarding of the attachment was an excess of jurisdiction, the defendant being sued as a foreign potentate, and not being amenable to the local jurisdiction.

De Haber v. The Queen of Portugal, 20 L. J. N. S. Q. B. 488.

Just as a foreign sovereign is exempt from personal liability in regard to acts done by him as sovereign, so we may gather from the above case that he is exempt from any proceedings against his property, when sued in his public capacity. Where, however, the property is not connected with his *jus coronæ*, then liabilities accruing in connection with it may be the subject of jurisdiction on the part of the local courts.

The rule that the municipal courts of this country have no cognizance over public and political transactions relating to foreign States, will not preclude their interfering under certain circumstances to prevent the violation in this country of a rule of foreign municipal law. In the case of the *Emperor of Austria v. Day* (2 Giff. 628), the defendants, Messrs. Day, had manufactured in Great Britain a large quantity of Hungarian paper money on behalf of the rebel government, which was presided over by Kossuth. Proceedings were taken in England on behalf of the Emperor of Austria to restrain them from manufacturing any more, or disposing of what they had already manufactured. The application was resisted, on the ground that the Court had no jurisdiction to inquire into a matter outside English municipal law, and relating to the public and political affairs of a foreign nation. Stuart, V.-C., in giving judgment, held that the regulation of the coin was not merely a question of municipal law, and that the prerogative of each sovereign State as to money was a great public right recognised and protected by the Law of Nations. It was held to be immaterial that the other defendant Kossuth, for whom the notes were manufactured, contemplated the overthrow of the plaintiff's existing rights, and that it was after such overthrow that he intended to use the notes. The injunction prayed for was accordingly granted.

PRIOLEAU v. THE UNITED STATES OF AMERICA.*Temp.* 1866.

[L. R. 2 Eq. 659.]

●

Case.] The United States commenced proceedings here for the purpose of establishing their right to certain bales of cotton, then in the possession of the Mersey Docks and Harbour Board. Messrs. Prioleau, the defendants, commenced cross-proceedings against the United States and President Andrew Johnson, for the purpose of obtaining discovery. These proceedings were demurred to by the United States.

Judgment.] It was held that the United States, having submitted themselves to the jurisdiction of the Courts of this country, Messrs. Prioleau were entitled to discovery, and that the former proceedings must be stayed until discovery was made. The Court, however, intimated that the President had been improperly made a defendant to the cross-proceedings, as the person to give discovery, inasmuch as it did not appear that the United States Government had control over their President or could compel him to make the discovery.

Prioleau v. The United States of America, L. R. 2 Eq. 659.

If a foreign sovereign once attorns to the local jurisdiction, he is then bound by the ordinary rules of procedure, and can claim no special exemption or privilege. The principle, however, that if a foreign sovereign attorns to the jurisdiction of the municipal tribunal, he stands in the position of any other suitor, must be taken subject to the limitation imposed by *Vavasseur v. Krupp* (L. R. 9 Ch. D. 351). In this case it appeared that the Mikado of Japan had bought in Germany some shells which had been lawfully made there. They were brought to England on their way to Japan. An injunction was obtained as against the defendant Krupp, restraining the removal of the shells from England, on the ground that they constituted an infringement of an English patent. On the application of the Mikado, he was made a party to the suit, and a motion was thereupon made on his behalf for dissolution of the injunction. On the hearing of the motion

liberty was given to the Mikado to take the shells that belonged to him out of the jurisdiction. The plaintiffs appealed from this order, but the appeal was dismissed with costs. James, L.J., in giving judgment, held that a foreign sovereign could not be deprived of his property because it had become tainted by the infringement of a patent. As to the suggestion that the Mikado had lost his privilege through submitting to the jurisdiction, he merely submitted for the purpose of discovery, process, and costs, and did not submit his property to be dealt with by a Court of municipal jurisdiction, and in violation of his rights. No Court of municipal jurisdiction was authorized to interfere with such rights. Brett, L.J., in his judgment, took a similar view with reference to the effect of the Mikado's interference in the suit, and laid down that no Court in England could properly prevent him from having goods which were the public property of his own country.

ALIENS—NATIONALITY.

CASE OF MARTIN KOSZTA.

Temp. 1853.

[WHEATON'S INTERNATIONAL LAW BY LAWRENCE, 229 ; HALL'S INTERNATIONAL LAW, 2ND EDITION, 217.]

Case.] Martin Koszta, a Hungarian subject, after taking part in the rebellion of 1848-9, fled to Turkey. Here he was imprisoned by the Turkish Government at the instance of Austria, but was afterwards released on condition of his leaving that country. He chose the United States as the place of his exile, and declared his intention of becoming naturalized. The conditions of naturalization in the United States are five years' residence, together with a formal declaration of intention, made at least two years previous to the completion of the required term of residence. Koszta made the preliminary declaration, but before the five years had expired he returned to Smyrna, having obtained from the

United States consul a travelling pass stating that he was entitled to United States protection. While at Smyrna he was, according to Wheaton, seized by persons in the pay of Austria, taken by them to sea, thrown overboard and picked up by an Austrian man-of-war. The American consul demanded his release, and a man-of-war was sent to enforce this. The matter was ultimately compromised through the mediation of the French consul, and Koszta was sent back to the United States, but Austria reserved the right to proceed against him if he returned to Turkey.

Case of Martin Koszta: Wheaton's International Law by Lawrence, p. 229; Hall's International Law, 2nd Edition, p. 217.

This case raises several important questions of International Law. The first of these is, did the incipient but incomplete naturalization of Koszta in the United States entitle him to the protection of a citizen of that country? This question was left unsettled, but Mr. Marcy, in his despatch, affirmed that whether Koszta was a United States citizen or not, the Austrian Government had no right to seize him on Turkish soil. The truth of this can scarcely be denied. On the other hand, it is difficult to say that the United States would have been justified in having recourse to force in the first instance. It was at once the right and the duty of Turkey to insist on reparation by Austria.

Passing to the subject of political status generally, it appears that the conditions by which it is determined vary in different countries. By the law of England and the United States, nationality or political status is primarily determined by locality of birth. In England this is subject to various exceptions, both at Common Law and by statute (see 25 Edw. III. st. 2; 7 Anne, c. 5; 13 Geo. III. c. 21; and the Naturalization Act, 1870, 33 & 34 Vict. c. 102). By the law of Germany and Austria, the test of political status is found in the nationality of the parents. By the law of France, the test is the same, subject to a right on the part of a child born in France of foreign parents to elect French nationality within one year of becoming *sui juris*.

CASE OF SIMON TOUSIG.*Temp.* 1854.

[WHEATON'S INTERNATIONAL LAW BY LAWRENCE, APP., 929.]

Case.] According to the law of Austria no Austrian subject can transfer his allegiance without the consent of the sovereign. In 1848, Simon Tousig, an Austrian subject, obtained a passport allowing him to travel for one year through Germany to France and England. In 1849, without obtaining any further licence, he went to the United States. Here he proposed to become naturalized, but before completing his naturalization he returned to Austria, when criminal proceedings for illegal emigration were instituted against him. He thereupon claimed the protection of the United States, but interference on his behalf was declined on the ground that as he had once been subject to the laws of Austria, and had, while so subject, violated those laws, his withdrawal from his native jurisdiction and proposed acquisition of a different national character would not exempt him from their operation whenever he again chose to place himself under them.

Opinion.] Mr. Marcy, in his despatch to the United States Ambassador at Vienna, admitted that every nation, when its laws were violated by anyone owing obedience to them, whether a citizen or a stranger, had a right to punish the transgressor when found within its jurisdiction, and the case was not altered by the character of the laws unless they were in derogation of the well established International code. No nation had a right to supervise the municipal code of another nation, or claim that its citizens or subjects should be exempted from the operation of its code, if they had voluntarily placed themselves under it. The character of the municipal laws of one country did not furnish a just ground for other States to interfere with the execution of those laws even upon their own citizens when they had gone into that country and subjected themselves to its jurisdiction.

Case of Simon Tousig: Wheaton's International Law
by Lawrence, App., 929.

The difference between the attitude of the United States in the present case and in that of Martin Koszta appears to have arisen from the fact of the return to Austrian jurisdiction having been voluntary, while in the case of Martin Koszta there had been a compulsory seizure by the Austrian authorities, practically within the territory of another State. It will be seen from the cases referred to below, that the doctrine affirmed by Mr. Marcy has since undergone considerable modification (x).

Naturalization implies the renunciation of one political status and the adoption of another. It involves two questions: (1) How far will it be recognized by the parent State as exempting the party naturalized from the consequences of his earlier allegiance? In other words, How far is there a right of expatriation? (2) Under what conditions will it be granted by the State to which the alien seeks to affiliate himself?

In regard to the first question, many States formerly refused to allow their subjects to defeat their previous allegiance. The maxim of English Common Law, "*Nemo potest exuere patriam*," precluded a natural-born subject from adopting a new political status, and rendered him liable to the penalties of treason if found in arms against his native country. The existence of this principle gave rise to many disputes between Great Britain and the United States, and was formally abandoned by statute (Naturalization Act, 1870) (y). By a treaty entered into, in the same year, between Great Britain and the United States, it was provided that British subjects becoming naturalized in the United States should be treated in all respects as United States citizens; and a corresponding provision was made with respect to United States citizens becoming naturalized in British dominions.

It is still contended, however, by many writers on International Law that there is no right of expatriation, and that the subject of one State cannot contract a new allegiance without his native country's consent. Mr. Hall is of opinion that International Law recognizes no such right, and adds that the affirmation of such a right would indicate a disregard at once of comity and convenience (z). But there can be no doubt that the fast changing conditions of modern political life, and the exigencies of modern trade and commerce, will all tend sooner or later to force an acceptance of this principle on International Law; though it may be subject to a continuing liability for non-extraditable offences previously committed where this is not got rid of by prescription.

Nothing can illustrate this better than a comparison of the earlier and later attitude of the United States.

(x) See p. 58, *infra*.

(y) 33 & 34 Vict. c. 102.

(z) International Law, 2nd Edition
pp. 214, 215.

In the case of *Ignacio Tolen*, a Spaniard who had been naturalized in the United States, Mr. Secretary Webster, in a despatch dated 25th June, 1852, stated that if the Spanish Government recognized the rights of its subjects to denationalize themselves and assimilate themselves with other countries, the usual passport would be a sufficient guard; but if the law of Spain did not permit them to renounce this allegiance, they must expect to be liable to the obligations of Spanish subjects whenever they placed themselves under the jurisdiction of the Spanish Government. Again, in 1853 the American minister at Berlin was instructed that the naturalization laws of the United States assumed that a person could by his own acts divest himself of allegiance to the government of the country where he was born, and contract a new allegiance to another State; but if a native Prussian naturalized in the United States returned to Prussia, the United States could not protect him from the Prussian laws.

In 1859, however, the American views appear to have changed. In that year a similar question arose between the same governments. It was then laid down by the United States' authorities that if a native Prussian were naturalized in the States, his allegiance to his native country would be severed for ever; should he return to his native country, he would do so as an American citizen and in no other character. In 1868 an Act of Congress was passed, declaring that the right of expatriation was an inherent right of all people, and enacting that all naturalized citizens of the United States should, when in a foreign country, be entitled to receive from their government protection similar to that accorded to native-born subjects in the like circumstances.

As to the conditions on which naturalization will be allowed by the States to which the applicant seeks to affiliate himself, these vary in different countries. According to the law of Great Britain, any foreigner who has resided in the United Kingdom for five years, or has for that period held service under the Crown, can obtain a certificate of naturalization from one of the principal Secretaries of State; he is then to be considered a British subject for all purposes, except that when in his country of origin he is not to be so considered, unless he has ceased to be a subject of that country, either in accordance with its laws or under a treaty. In the United States a foreigner must make a declaration on oath of his intention to become naturalized; after the lapse of two years from the date of this declaration and after five years' residence in the United States, he becomes a United States citizen. In France, a foreigner who has obtained permission to become domiciled in France is entitled to letters of declaration of naturalization after three years' residence. In Germany, naturalization can only be conferred by the high administrative authorities; the applicant must show that he

is at liberty, under the laws of his native country, to change his nationality, or, if he is a minor, that his father or guardian has given him the requisite permission, that he is leading a respectable life, that he is domiciled in Germany, and that he has the means of livelihood.

CASE OF LUCIEN ALIBERT.

Temp. 1852.

[U. S. SENATE DOCUMENTS, 1859—60, VOL. II., p. 176.]

Case.] Lucien Alibert, a French subject, went to America when eighteen years of age. He was naturalized at twenty-six, and returned to France at thirty-three, when he was arrested as an *insoumis*. He pleaded naturalization in America, but was convicted. Subsequently, however, the sentence passed on him was remitted, on the ground that more than three years had elapsed between the time when he was naturalized and the date of his return to France.

Case of Lucien Alibert: U. S. Senate Documents, 1859—60, Vol. II., p. 176.

In countries where military service is compulsory, naturalization in fraud of this is either prohibited, or renders the offender liable to imprisonment if he returns, and forfeiture of all property subsequently acquired in his native country. By the law of France, every Frenchman is subject to the obligation of military service, and if he emigrates without having served his time in the army, he is liable to a penalty. An *insoumis*, or person who fails to join his standard when called upon, ceases to be liable to the conscription on acquiring a foreign nationality, although he still remains subject to the penalty for evading the military law. If he remains abroad for three years after naturalization, his offence becomes purged by prescription, and he may return to France free from liability. By the law of Prussia, every Prussian subject is liable to military service, which cannot be performed by deputy. By the Prussian Penal Code, any one

emigrating without permission, in order to avoid military service, is liable to fine and imprisonment, and remains, notwithstanding, liable to perform military service, if he returns.

DOMICILE—CIVIL STATUS.

THE "INDIAN CHIEF."

Temp. 1800.

[3 C. ROB. 12.]

Case.] In 1795, during war between Great Britain and Holland, the "Indian Chief," a vessel belonging to one Johnson, sailed from London to Madeira, and thence to Madras, Tranquebar and Batavia. On the return voyage the master put into Cowes for the purpose of receiving orders respecting a cargo taken in at Batavia. Here the ship was arrested on the ground that she was the property of a British subject and had been engaged in an illegal trade with the enemy. It appeared that Johnson had been born in America before the War of Independence, that he then came to reside in England, and had engaged in commerce here between 1785 and 1797. During this time the Court considered that he had undoubtedly acquired an English domicile, and had become subject to English municipal law. It appeared, however, that in 1797, before the capture of the vessel, he had left this country and returned to the United States. The Court on this held that his character as an American citizen had reverted, and that the vessel was consequently not liable to condemnation.

Judgment.] Sir W. Scott in giving judgment stated that if a person went to another country and engaged in trade and resided there, he was by the Law of Nations to be considered as a merchant of that country. But as Mr. Johnson's charac-

ter as a British merchant was founded on residence only, it must be held that from the moment he turned his back on the country where he had resided he was in the act of resuming his original character, and was to be considered as an American citizen. The character that was gained by residence ceased with residence. It was an adventitious character which no longer adhered to him from the moment that he put himself in motion *bonâ fide* to quit the country *sine animo revertendi*.

A question arose in the same case as to the liability of the cargo and the nationality of its owner. The latter appeared to have acted as American Consul at Calcutta, and to have engaged in trade there. After some discussion as to the British authority in India, it was pointed out in the judgment that as the credentials of the Consul were addressed to the British Government, and not to the Mogul, he must be considered as a British merchant, and that his property, having been taken in trade with the enemy, must be held liable to confiscation.

The Indian Chief, 3 C. Rob. 12.

International Law recognizes two *statûs*, a political *status*, by which a man becomes a member of some particular State, whether he resides in that State or not ; and a civil *status*, by which a man becomes invested with certain municipal rights and duties. The latter character is determined by his domicile. It is the law of domicile which regulates such questions as legitimacy, minority, capacity to contract, and capacity to hold property. Such matters fall within the domain of private International Law, or the Comity of Nations. The question of domicile is mainly important in public International Law as determining enemy-character in time of war, and the consequent liability of ships and property captured at sea.

Domicile has been defined as a man's principal place of residence. It is the place where he has his home, "the centre of his jural relations" (y). Every man, until he is *sui juris*, is presumed to have the domicil of his father if legitimate, of his mother if illegitimate. But if the paternity of an illegitimate child is fixed, the father's domicile attaches to him. This has been called domicile of origin. When a

(y) Savigny, Des Heutigen Römischen Rechts, VIII., 58.

man becomes *sui juris*, it is competent to him to select another domicile. For this it is necessary that he should voluntarily take up his residence at a particular place, with intent to remain there for an unlimited time. This constitutes a new domicile, which, so long as the residence continues, suspends the operation of the law of his earlier domicile, and determines the character of his civil rights and duties for the time being. Should the domicile of choice, however, be positively put an end to without a new domicile being acquired, the law of the domicile of origin revives, and continues to govern his relations, until a new domicile is fixed on (a). The difficulty lies not so much in determining the principles of law applicable to this subject, as in applying them.

With regard to enemy-character in time of war, it must be remarked that an individual is not tied down to the domicile in which he is found at the beginning of a war. So soon as he actually removes elsewhere, or takes steps to effect a removal, in good faith and without intention to return, he severs his connection with his original domicile. But such change, on outbreak of war, is scrutinized very closely. In case of capture, the onus of proof is on the claimant. The change of character is, however, much easier when it is from an acquired domicile to domicile of origin, than when this is reversed.

THE "PORTLAND."

Temp. 1800.

[3 C. ROB. 41.]

Case.] During war between Great Britain and France, at the close of the last century, the "Portland" was seized on the ground that the owner of part of the cargo was an enemy-subject. It appeared that Mr. Ostermyer, the person in question, was a German who had a house of business at Ostend, within the enemy's territory, and also a house at Hamburgh, not within it. The transaction being connected

(a) This, though settled by the cases, is very doubtful as a principle, for *logically* the domicile a man voluntarily chooses should be preferred to a domicile that he only has by operation of

law. The preference shown in the cases for the latter seems to be a survival of the old confusion between nationality and domicile.

with the Hamburg house, it was held that the cargo was not liable to condemnation.

Judgment.] Sir W. Scott in giving judgment stated that the consequence of Mr. Ostermyer's being engaged in trade in Ostend, could not be extended to the trade which he was carrying on at Hamburg, which was unconnected with the Ostend trade. In the present case there was a neutral residence; the nature of the transaction and the destination were perfectly neutral. The fact of Mr. Ostermyer's trading to Ostend could not affect his commerce in other parts of the world, unless it could be said that trading in an enemy's commerce made him as to all his concerns an enemy, or that being engaged in a house of trade in the enemy's country would give an enemy-character to all his transactions. But there was no case or principle to support such a proposition. The consequence of his having connection at Ostend must be limited to his Ostend trade, and his other trade must be exonerated.

The Portland, 3 C. Rob. 41.

A person, though not resident in a country, may be so associated with it, through having, or being a partner in a house of trade there, as to be imbued with an enemy-character in respect of property connected with that trade. This is called commercial domicile. The application of this rule is not modified, according to the practice of England and the United States, by the fact that the person falling under its operation is a consul for either a neutral or a belligerent. A curious illustration of this liability in virtue of commercial domicile is afforded by the case of the "*Jonge Klassina*" (5 C. Rob. 297). In this case it appeared that, during war between Great Britain and Holland, one Ravie, who had business both at Birmingham and Amsterdam, had imported goods from Holland under a licence accorded to him by the British Government, the licence being confined to the import of goods belonging to him (presumably as a Birmingham merchant). In the present case it appeared that M. Ravie was the exporter from Holland as well as the importer into England. It was laid down in the judgment that, if a man had mercantile concerns in two countries, and acted as a merchant of both, he must be liable to be considered as a subject of both with regard to the transactions originating respectively in those countries.

It was held that, under the circumstances, the licence did not protect the transaction so far as regarded the exportation by Ravie of goods from Amsterdam, which belonged to him as a Dutch merchant, and confiscation of these goods was decreed.

But while, on the one hand, domicile in a belligerent country involves these liabilities, on the other hand, domicile in a neutral country, even on the part of a natural-born subject of either belligerent, not only exempts his property from capture as enemy-property by the other, but also entitles him to carry on trade with that other without incurring any liability towards his native country on the ground of trading with the enemy. Thus in the case of the "Danous" (cited in 4 C. Rob. 255), a British subject domiciled in Portugal was allowed the benefit of Portuguese character so far as to protect a trade carried on by him with Holland, although the latter Power was at war with Great Britain.

Until naturalization, however, it is not permitted to a natural-born subject to engage in war against his native country.

CASE OF MR. MACKETT.

Temp. 1863.

[HALLECK'S INTERNATIONAL LAW, VOL. I., p. 375.]

Case.] In 1863 Mr. Mackett, a natural-born British subject, then resident in the United States, was arrested. He had not been naturalized, and he applied for redress to the British Government. It appeared that he had, while in the United States, voted at elections, and on this ground the British Government declined to interfere.

Case of Mr. Mackett: Halleck's International Law, Vol. I., p. 375.

During the American civil war a question arose as to the liability of aliens resident in the United States to serve in the army of that country. Lord Lyons was instructed that there was no principle of International Law requiring them to do so. It was pointed out by the British authorities that persons taking part in the war in question might be considered rebels, in addition to being exposed to the ordinary vicissitudes of war ; but it was at the same time determined

to leave British subjects domiciled in the country under all liabilities imposed by its laws.

The more reasonable rules, according to Bluntschli, are :—(1.) Aliens are not obliged, without their own consent, to serve in a force intended for ordinary national or political objects ; (2.) They are obliged to help to maintain social order where the action required of them is kept within the bounds of police as distinguished from political action ; (3.) They may be compelled to defend the country when it is threatened by an invasion of savages or uncivilized nations (*b*).

AMBASSADORS—STATE AGENTS.

LESLEY, BISHOP OF ROSS.

Temp. 1571.

[SOMERS' TRACTS, 2ND EDITION, BY SCOTT, VOL. I., p. 186.]

Case.] In the reign of Elizabeth, John Lesley, Bishop of Ross, was concerned with others in furthering a scheme for the marriage of Mary Queen of Scots with the Duke of Norfolk. When that miscarried, he engaged in other enterprises for Mary's relief. He was imprisoned by the English Government, but was subsequently liberated on condition of his leaving the kingdom.

Opinion.] The Bishop of Ross having claimed privilege as Mary's ambassador, notwithstanding that Mary was a prisoner in England, the crown lawyers were consulted as to this contention, and they expressed the following opinion :—1st, that an ambassador that raises rebellion against the prince to whom he is sent has forfeited the privileges of an ambassador as such, and is liable to punishment ; 2ndly, that the agent of a prince, deposed from public authority, and in whose stead another is substituted, cannot challenge the privileges of an ambassador ; 3rdly, that if a prince comes

(*b*) Bluntschli, § 391.

into another's kingdom and is imprisoned there, he may have an agent if he has not forfeited his principality, but whether that agent be reputed an ambassador depends upon the authority of his commission; 4thly, that a prince may forbid entrance into his kingdom to such an agent, and may command him to leave the kingdom if he do not keep himself within the bounds prescribed to ambassadors, but the agent may, in the meantime, enjoy the privileges of an ambassador according to the authority deputed to him.

Lesley, Bishop of Ross: Somers' Tracts, 2nd Edition, by Scott, Vol. I., p. 186.

This case is cited as showing the attitude of the English lawyers towards ambassadorial privilege at the end of the sixteenth century. It would seem that at Common Law ambassadors were liable for offences committed against the Sovereign to whom they were accredited. Later cases, however, show that municipal law has in this respect been brought into harmony with International Law. Thus in the same reign Mendoza, the Spanish ambassador, having taken part in a conspiracy, the object of which was to dethrone the Queen, was arrested by order of the English Government. A question having been raised as to whether he was amenable to English jurisdiction, an opinion was given by Albericus Gentilis and Francis Hotman to the effect that an ambassador, who had been concerned in a conspiracy against the Sovereign to whom he was accredited, could not be put to death, but must be remanded to his own Sovereign for punishment. In accordance with this opinion, Mendoza was sent out of the country (c).

The privileges of an ambassador at International Law may be grouped under two heads, inviolability of person and extraterritoriality.

The inviolability of his person commences when his public character has been proved and recognized. No active force can in general be exerted against him, the only exception being where he commits a great crime and refuses to depart on request. Even in that case he must be removed without personal injury.

He is, in general, exempt from the criminal jurisdiction of the country to which he is accredited (cc).

As to civil jurisdiction, he is to be regarded as in the same position

(c) Camden's History of England, Vol. II., p. 497.

(cc) But see Gyllenbourg's Case, p. 68.

as an absent stranger, the only exceptions to the rule being : (1.) In respect of acts committed otherwise than in his official capacity ; (2.) Where he is a subject of the State to which he is accredited ; (3.) Where he is in the service of that State ; (4.) Where he has voluntarily recognized the jurisdiction (ccc).

The exemption from local jurisdiction extends to his family and the members of his suite.

His hotel and goods are also exempt from the jurisdiction, the exemption as to his property, however, extending only to that held by him in his official capacity. Moreover, all goods imported by him for his personal use are free from imposts, and liberty of worship in his hotel is always afforded to him, even where his religion is not otherwise tolerated in the country.

The jurisdiction of an ambassador over his suite is generally confined, in modern times, to subordinate matters.

The precise limits of ambassadorial privileges may be gathered from the appended cases.

Before passing to these, it may not, perhaps, be out of place to mention that, under the regulations of the Congress of Vienna, 1815, and that of Aix-la-Chapelle, 1818, four classes of diplomatic agents are recognized. These, in the usual order of precedence, are :—(1.) Ambassadors, papal legates, and nuncios ; (2.) Envoys and ministers plenipotentiary accredited to the Sovereign ; (3.) Ministers resident accredited to the Sovereign ; (4.) *Chargés d'Affaires* accredited to the Minister for Foreign Affairs. Ministers from different countries included in the same class take precedence in the order of the notification of their arrival ; family ties and ties of alliance between the Sovereigns give no ground of precedence. With reference to papal legates, Roman Catholic Powers formerly gave them precedence, but other Powers did not conform to this practice, and Great Britain expressly refused to allow it. Sometimes ministers of the second order have precedence given to them as a matter of courtesy. All these classes of diplomatic agents are entitled to the immunities above described.

(ccc) See cases of *Czar's Ambassador*, and *Taylor v. Best*, with notes, pp. 70—73.

GYLLENBOURG'S CASE.

Temp. 1717.

[DE MARTENS, CAUSES CÉLÈBRES, VOL. I., p. 97.]

Case.] In 1717, Count Gyllenbourg, the Swedish Ambassador to England, was arrested for complicity in a plot against the Hanoverian dynasty. Instead of being immediately sent from the kingdom he was detained here for a time, the detention being partly due to the fact that similar measures had been adopted by the Swedish Government towards the English Minister in Sweden. Some dissatisfaction at the arrest was at first expressed by other ambassadors accredited to England, but these expressions were subsequently withdrawn when the facts of the case were known, the Secretary of State having pointed out that what had been done was necessary for the peace of the kingdom. In consequence of the mediation of other Powers, both ambassadors were subsequently released.

Gyllenbourg's Case: De Martens, Causes Célèbres, Vol. I., p. 97.

A diplomatic agent cannot, as a rule, be tried, or even arrested, for a criminal offence by the State to which he is accredited. If he commits a crime, application should be made to the State from which he is accredited to recall him, or he may be ordered to leave at once, without communication being previously made to his Government.

Gyllenbourg's case shows that this principle of International Law is subject to modification in cases of extreme political necessity.

PANTALEON SA'S CASE.

Temp. 1653.

[ZOUCH, SOLUTIO QUÆSTIONIS VETERIS ET NOVÆ, SIVE DE LEGATI DELINQUENTIS JUDICE COMPETENTE DISSERTATIO, IN PRÆFATIONE.]

Case.] Pantaleon Sa, the brother of the Portuguese Ambassador under Cromwell, and one of his train, fell into a quarrel with one Gerrard, and wounded him, the latter's life only being saved by the interference of a by-stander. The next night Sa came to the same place with fifty of his fellow-countrymen; they wounded a great many persons and killed one.

Opinion and Result.] The matter was referred to a special Court, who held that Sa was amenable to our laws. He was indicted, tried, found guilty and suffered death. It appears from a report of the case, that if Sa had been an ambassador his privilege would have protected him, but a distinction was made between the principal and members of his train.

Pantaleon Sa's Case: Zouch, Solutio quæstionis veteris et novæ, sive de legati delinquentis judice competente dissertatio; in præfatione.

In spite of the decision in Sa's case, the exemption from local jurisdiction conferred on an ambassador is usually extended to members of his train. It appears, however, that he would not be allowed to receive an accused person or fugitive criminal into his house with the view of giving him protection. Thus, in 1867, a Russian subject, not in the employ of the Russian ambassador, attacked and wounded an *attaché* in the Russian embassy in Paris. The Russian Government requested his surrender; the French authorities refused to surrender him; firstly, because the fiction of extritoriality could not be extended to embrace his case, and, secondly, because the immunities of the house, if any, had been waived by the police having been called in (*d*).

If one of the suite commits a crime outside the ambassador's house, the proper course for the local authorities to adopt is to

(*d*) Dana's note to Wheaton, No. 129.

deliver him up to the ambassador, who should collect the evidence relating to the case and send the accused to his own Government for trial. But though these are the strict rights of the ambassador, the more convenient course is for the ambassador to send the offender to the local tribunals for trial.

It should be noted that the English law on this subject is exceptional. Some illustration of this is afforded by the action of the authorities in the case of a servant of Mr. Gallatin, the United States minister in London. This servant having committed an assault, outside the limits of the ambassador's house, the local authorities claimed jurisdiction with reference to the case. The Government also claimed the right of arresting the offender within the minister's house, but admitted that, as a matter of courtesy, notice should be given of the intention to arrest, so that either the offender might be voluntarily handed over by the ambassador, or, failing this, might be arrested by the local authorities at a time convenient to the minister (c).

CASE OF THE CZAR'S AMBASSADOR.

Temp. 1708.

[PHILLIMORE'S INTERNATIONAL LAW, VOL. II., p. 228.]

In 1708, the ambassador of Peter the Great in London was arrested there for a debt of £50. Instead of applying for a discharge on the ground of privilege, he gave bail in the action, but on the following day complained to the Queen. Those who were concerned in the arrest were then examined before the Privy Council, and thereupon committed to prison and prosecuted by information in the Court of Queen's Bench at the suit of the Attorney-General. At the trial the question of law was reserved for argument before the judges, but was never determined. Meanwhile, to mitigate the indignation of the Czar, the Government of the day caused

an Act to be passed precluding such proceedings in the future.

Case of the Czar's Ambassador: Phillimore's International Law, Vol. II., p. 228.

Coke, the only authority as to the earlier law on this subject, lays down that ambassadors are liable in civil cases on contracts *jure gentium*; but even if the ambassador was at Common Law liable to civil jurisdiction, it does not follow that he was liable to arrest. Any doubt on this subject, however, is set at rest by stat. 7 Anne, c. 12. By this statute all proceedings for the arrest and imprisonment of a foreign ambassador or minister, or his domestic servant, or for the seizure of the goods or chattels of any such person, are void. By section (5) no merchant or trader within the meaning of the Bankruptcy Laws in the service of an ambassador or minister is to have the benefit of the Act, and no person is liable to the penalties imposed by the Act for arresting any servant of an ambassador or foreign minister unless the name of the servant is registered in the office of one of the principal Secretaries of State as provided by the Act. With regard to the interpretation of this clause, it was held by Lord Mansfield in *Triquet v. Bath* (3 Burr. 1478), that proof of actual *bond fide* service was enough to secure exemption, and that the fact of the defendant in the case having previously been a trader in Ireland would not bring him within the exception set up by the 5th section of the Act.

Passing from English Law to the Law of Nations, it would seem that, according to generally accepted rules, an ambassador is not liable to any form of civil execution. Thus, in an important case mentioned by Wheaton (f), it appears that the United States Ambassador at Berlin had rented a house of a Prussian subject. A question arose, whether a lien, for rent and for damage done to the house, could be enforced against the goods of the ambassador left in the house, this lien being annexed to the contract of tenancy by the Prussian Civil Code. Prussia contended that the right of detention was a part of the contract, attached to it by the Prussian Civil Code, and that the ambassador by entering into the contract had resigned an immunity which he otherwise might have claimed. The United States replied that, if this principle were true, it might be contended that an ambassador rendered himself liable to

(f) Wheaton's International Law, English Edition by Boyd, p. 287.

arrest by accepting a bill of exchange. The goods were ultimately restored on payment being made for the damage done. Prussia, however, propounded the question, whether an ambassador who gave goods in pledge could recover them merely on the ground of privilege. The United States in their reply distinguished between an express pledge, where it was admitted that he could not recover the property, and an implied pledge given by the municipal law of the country, by which an ambassador would not be bound.

TAYLOR v. BEST AND OTHERS.

Temp. 1854.

[14 COM. BENCH, 487.]

Case.] This action was brought against certain persons upon a contract entered into in Belgium. Amongst the defendants was M. Drouet, the Belgian Secretary of Legation. M. Drouet duly entered an appearance, and the case was proceeded with till ready for trial, the defendants having even obtained a rule for a special jury. A summons was then taken out on M. Drouet's behalf, calling upon the plaintiffs to show cause why all further proceedings should not be stayed or his name struck out of the proceedings, on the ground that he was a foreign minister.

Judgment.] It was held, first, that a secretary of legation was entitled to all the privileges of an ambassador; secondly, that he did not forfeit his privilege of immunity from jurisdiction by engaging in mercantile pursuits here; but, thirdly, that having voluntarily attorned to the jurisdiction, M. Drouet was estopped from setting up his privilege, though in the event of judgment being given against him, no execution could be taken out against either his person or property, this being precluded by the Act of 7 Anne, c. 12.

Taylor v. Best, 14 Com. Bench, 487.

The immunity of an ambassador from civil execution has already been dealt with. In *Taylor v. Best* the Court had to determine how far an ambassador was amenable to the earlier stages of civil jurisdiction. The result was that, whilst fully recognising his immunity from civil execution, it yet held that he might under certain conditions be within the local jurisdiction. The law laid down in this case, however, has since been modified by the decision in the case of *The Magdalena Steam Navigation Co. v. Martin* (28 L. J., Q. B., N. S. 310). In this case, the defendant, a foreign ambassador, was sued for calls on shares in a company in liquidation. The defendant pleaded his privilege as foreign ambassador. On demurrer judgment was given for the defendant, it being laid down that a public minister accredited to the Queen by a foreign State was privileged from all liability to be sued here in civil actions. As to a suggestion that the action might be prosecuted to judgment with the view of ascertaining the amount of the debt, the Court held that such a view was untenable; that such proceedings would be anomalous, and would violate the principle laid down by Grotius (*g*), "*Omnis coactio abesse a legato debet*;" they would produce the most serious inconvenience to the defendant, and would hardly be of any benefit to the plaintiff.

This case seems to establish the entire immunity of an ambassador from civil jurisdiction. Neither is there, it would seem, any power to compel a diplomatic agent or a member of his suite to attend the local tribunals, or even to give evidence concerning any matter. When evidence is required from an ambassador or a member of his suite, the practice is to apply to the ambassador and, although he may decline to furnish it, yet it is not customary for him to assert this privilege. The evidence is generally taken before the Secretary of Legation, or some official whom the minister consents to receive, and is transmitted to the Court in writing. When, however, by the local laws, evidence must be given orally before the Court in the presence of the accused, it is usual for the minister to submit himself for examination in the ordinary way.

On the trial of Herbert for murder at Washington, in 1856, the Minister for the Netherlands, an important witness, refused to appear in Court at the request of the United States Government. His own Government also refused to instruct him to appear as a witness, although requested to do so by the United States. The United States Government, whilst admitting his right to decline to appear, demanded his recall (*h*).

(*g*) De Jure Belli et Pacis, l. 2, c. 18, s. 9.

(*h*) Calvo, § 583—4, and note.

VIVEASH v. BECKER.

Temp. 1814.

[3 MAULE & SELWYN, 284.]

Case.] The defendant, a merchant resident in London, was arrested, in 1814, for a debt of 548*l.*, and compelled to give a bail bond. A rule *nisi* for delivery up of the bond was obtained on his behalf, on the ground that he had been appointed Consul to the Duke of Oldenburg, and was acting in this capacity.

Judgment.] On the application to make the rule absolute, Lord Ellenborough expressed an opinion that a consul was entitled to limited privileges, such as safe conduct, and if this was violated, his Sovereign had a right to complain; but he stated that it had been laid down that a consul was not a public minister, and was not entitled to the *jus gentium*. The Act of Anne quoted above, which mentioned only ambassadors and public ministers, must be considered as declaratory, not only of what the Law of Nations was, but of the extent to which it should be carried. A different construction would lead to enormous inconvenience, for consuls had the right of creating vice-consuls, and they, too, must have similar privileges. Thus a consul might appoint a vice-consul in every port to be armed with the same immunities, and be the means of creating an exemption from arrest indirectly which the Crown could not grant directly. Under these circumstances it was held that no privilege existed, that the defendant was liable to arrest, and that the application must therefore be refused.

Viveash v. Becker, 3 Mau. & Sel. 284.

Consuls are commercial agents appointed by commission or patent by a State in foreign parts. Their duties are mainly to advise and protect the interests of traders belonging to the State appointing

them, and to collect and remit to their Government information on mercantile matters.

Consuls, on appointment, usually receive an *exequatur*, or confirmation of their commission, from the State within whose territory they are to act. The *exequatur* generally takes the form of letters patent signed by the Sovereign and countersigned by a Secretary of State.

Consuls are usually exempt from taxation, and from having soldiers quartered on them, and their official papers are exempt from seizure. An outrage on a consul would be regarded as more serious than that on an ordinary subject. Beyond this, however, consuls have no privilege. They are not, at International Law, entitled to the privileges of ambassadors, or to any immunity from local jurisdiction.

In Eastern countries, however, by convention, the position of consuls has been assimilated to that of ambassadors (i).

It is worthy of remark that a person carrying on trade in a belligerent country is not exempted from the liabilities of a belligerent trader on the ground of his acting as consul for a neutral State (k).

McLEOD'S CASE.

Temp. 1842

[PARLIAMENTARY PAPERS, 1843, VOL. LXI.]

Case.] McLeod was a British officer who had taken part in the attack on the "Caroline" (l). In the course of this attack a United States citizen, Durfee by name, had been killed. McLeod was afterwards arrested in the United States, and charged with the murder. The British Minister at Washington demanded his release, calling attention to the fact that the destruction of the ship was a public act, done by persons in the employ of Her Majesty's Government, obeying superior orders, and that the responsibility, if any, rested with Her Majesty's Government. The United States Government replied that as the matter was in the hands of the Courts, it was out of

(i) For the status of consuls in the East, the reader is referred to Phillimore's *International Law*, Vol. II., pp. 312—316.

(k) *Sorensen v. The Queen*, 11 Moo. P. C. C. 141.

(l) An account of this case will be found on p. 163, *infra*.

their power to release McLeod summarily. McLeod was subsequently brought to trial, but acquitted. Mr. Webster, the Foreign Secretary, afterwards admitted that after the avowal of the transaction as a public one by the British Government no further responsibility existed on the part of the agent; and in the following year an Act of Congress was passed providing that subjects of foreign Powers taken into custody for acts done under public authority should be discharged.

McLeod's Case: Parliamentary Papers, 1848,
Vol. LXI.

McLeod's case is cited as illustrative of the immunity of public agents for acts done in their official capacity.

Neither officers in command of armed forces, nor the members of their forces, are amenable to the criminal or civil laws of a foreign State in respect of acts done in their official capacity.

SLAVE TRADE.

"LE LOUIS."

Temp. 1817.

[2 DODS. 210.]

Case.] In 1816, "Le Louis," a French ship, had been captured by an English colonial armed vessel, on suspicion of being engaged in the slave trade, and after resisting a demand to visit and search. She was taken to Sierra Leone and condemned by a Court of Vice-Admiralty, for being concerned in the slave trade, contrary to French law. Against the order of condemnation an appeal was made to the High Court of Admiralty.

Judgment.] Sir William Scott, in giving judgment, after adverting to the fact that the commander of the English vessel was authorized to seize and detain all vessels offending against the slave trade, observed that neither any British Act of Parliament, nor any commission founded on it, could affect any right or interest of foreigners, unless it was founded upon principles and imposed regulations consistent with the Law of Nations. The first matter of inquiry was, whether there was any right to visit and search. If there was no such right, and if it was only in the course of an illegal exercise of this right that it was ascertained that "*Le Louis*" was a French ship trading in slaves, then this fact having been made known to the captor by his own unwarranted acts, he could not avail himself of discoveries so produced. At present no nation could exercise a right of visitation and search upon the common and unappropriated parts of the sea save only on the belligerent claim. The right of visit in this case could only be legalised upon the ground that the captured vessel was to be regarded legally as a pirate. But slave traffic was not piracy in legal consideration, nor was it a crime by the universal Law of Nations. A nation had a right to enforce its own navigation laws so far as it did not interfere with the rights of others, but it had no right in consequence to visit and search all the *apparent* vessels of other countries on the high seas in order to institute an inquiry whether they were not its own vessels violating its own laws.

Moreover, after reviewing the facts, the learned Judge came to the conclusion that the captor had not proved the existence of a French prohibitory law, and upon this, as well as upon the other ground, he felt himself called upon to reverse the judgment of the Court below.

Le Louis, 2 Dods. 210.

This decision embodies two important principles: (1.) That the right of visit and search on the high seas is strictly a war right, and cannot, except in certain specified cases, be exercised by the public

vessels of one nation against the traders of another in time of peace. (2.) That the slave trade, though it may be dealt with as piracy by municipal law, yet cannot be regarded as piracy by the Law of Nations, except by universal consent.

The slave trade was for long regarded as a lawful and desirable branch of traffic. The moral feeling of mankind asserted itself but slowly; but at length the slave trade was made illegal by the municipal law of most maritime countries, although slavery was still tolerated. In Great Britain the slave trade was made illegal in 1808; and this example was soon afterwards followed by the United States, and ultimately by the other States of Europe. By later enactments, it came to be regarded as piracy at municipal law.

After the slave trade had thus been declared illegal, the question soon arose as to the right of the public vessels of one nation to interfere with this traffic when carried on by the traders of another nation. The earlier principle adopted, both by the Courts of Great Britain and the United States, seems to have been, that a public vessel had a right to visit, search, and bring in for adjudication any vessel found trading in slaves, subject to a right on the part of the latter to be released on showing that the slave trade was allowed by the law of the country to which she belonged. Thus, in the case of the "*Amedie*" (1 Acton, 240), an American vessel was engaged in carrying a cargo of slaves from Bonny, on the coast of Africa, to Matanzas, in the island of Cuba. She was captured by an English vessel, and condemned for being engaged in an illegal traffic by the Vice-Admiralty Court of Tortola. The decree was affirmed on appeal, Sir William Grant, in giving judgment, holding that the trade was *prima facie* illegal, and there was thrown on the claimant the burden of proving that, by the particular law of his own country, he was entitled to carry on the traffic. This was the earliest decision in the English Courts on the subject, and was followed in the subsequent case of the "*Fortuna*" (1 Dods. 81). In the case of the "*Diana*" (1 Dods. 95), a Swedish vessel, after taking a cargo on board at Gustavia St. Bartholomew, exchanged this at Cape Mount for one of slaves. Whilst carrying these to a Swedish island in the West Indies she was seized by H.M.S. "*Crocodile*," and brought in for adjudication. The ship and cargo were condemned by the Vice-Admiralty Court of Sierra Leone, but the decree of that Court was reversed on appeal, on the ground that Sweden had not prohibited the trade, and had tolerated it in practice; this decision being also in accordance with the principle of the "*Amedie*."

All these cases, however, seem to have been overruled by the decision in the case of "*Le Louis*," which has been followed in subsequent cases. In *Madrazo v. Willes* (3 B. & A. 353), the plaintiff was a Spanish merchant, whose ship had been seized by the defendant, a

captain in the Royal Navy, whilst engaged in the slave trade. In an action for compensation, the plaintiff obtained a verdict for 21,180*l.* damages, 18,180*l.* being in respect of the profit on the cargo of slaves. The defendant applied to have the damages reduced by that sum, the slave trade being unlawful by the law of England, but his application was refused, Bayley, J., holding, in his judgment, that the British statutes against the slave trade could not affect the subjects of other countries engaged in the slave trade outside the limits of British territory; the slave trade not being piracy *jure gentium*, although it might have been made so by municipal law.

It will be seen from the case of the "Antelope," and appended cases, that a similar course has been pursued by the United States Courts.

THE "ANTELOPE."

Temp. 1825.

[10 WHEATON, 66.]

Case.] In 1819, the "Columbia," a privateer, entered Baltimore, clandestinely shipped thirty or forty men, proceeded to sea and hoisted the Artegan flag, assuming the name of the "Arraganta." She captured an American vessel, from which she took twenty-five slaves, several Portuguese vessels, and the "Antelope," a Spanish vessel, from each of which she took some slaves (*m*). The "Arraganta" and "Antelope" sailed in company to Brazil, where the former was wrecked. Some of the crew and all the slaves were then put on board the "Antelope," which assumed the name of the "General Ramirez," under the command of John Smith. The "Antelope" was subsequently captured by a United States revenue cutter, and brought into Savannah for adjudication. The slaves were claimed by the Portuguese and Spanish

(*m*) It will be remembered that during the Spanish American War of Independence, the revolted colonies of

Spain fitted out privateers with the object of preying on Spanish commerce.

Consuls on behalf of the original owners, by Smith as captured *jure belli*, and by the United States as having been transported from foreign parts by American citizens in contravention of United States laws, and entitled to their freedom by those laws and by the Law of Nations.

The Circuit Court dismissed the claim of John Smith, and also the claim of the United States, except as to that portion of the slaves which had been taken from the American vessel, those remaining being divided between the Spanish and Portuguese claimants.

An appeal was taken to the Supreme Court.

Judgment.] Marshall, C. J., in giving judgment, stated that if, as it appeared, the slave trade was neither repugnant to the Law of Nations nor piracy, the right of bringing in a vessel for adjudication on this ground in time of peace, even where it belonged to a nation which has prohibited the trade, could not be upheld. It was not the practice of the Courts of any country to execute the penal laws of another. Every foreign vessel captured by United States cruisers in time of peace for slave trading must be restored. The decree, therefore, of the Circuit Court, so far as it directed restitution to the Spanish claimant of slaves found in the "Antelope" when captured was confirmed, the *onus probandi* as to which slaves belonged to him being on the claimant; the Portuguese slaves were decreed to be delivered up to the United States, inasmuch as there was not sufficient proof as to the ownership of them.

The Antelope, 10 Wheat. 66.

The same principle, which was laid down by Sir W. Grant in the case of the "Amedie," seems to have been adopted by the United States Courts in the case of "La Jeune Eugénie" (2 Mason, 409); but it was equally destined to give place to a more correct view of the relation of international to municipal law, and was overruled in the case of the "Antelope."

Though the slave trade was ultimately made piracy by the municipal law of most European countries, yet the result of these decisions

was to preclude, so far as the public vessels of Great Britain and the United States were concerned, any right of capture, or visit and search, in regard to the vessels of another nation engaged in the slave trade. To meet this defect, treaties were subsequently entered into between the principal civilized nations, according a mutual right of visit and search under certain conditions, and within certain limits. By treaties of the 30th of November, 1831, and the 22nd of May, 1833, between Great Britain and France, to which nearly all the maritime powers of Europe acceded, a mutual right of search, with the view of suppressing the slave trade, was conceded within certain geographical limits. By a treaty between Great Britain, Austria, France, Prussia, and Russia, dated the 20th of December, 1841, and subsequently ratified by all the signatories except France, the operation of the previous treaties was considerably extended. By the Treaty of Washington of the 7th of April, 1862, between Great Britain and the United States, it was agreed that such public vessels of each contracting party as might be provided with special instructions for the purpose, should, within certain geographical limits, be at liberty to visit such merchant ships of the two nations as might, upon reasonable grounds, be suspected of being, or of having during the voyage been engaged in, the African slave trade, or of having been fitted out for the purpose. The right of visit was to be exercised only by public vessels over merchant vessels, and was not to be exercised within the limits of a settlement or port, or within the territorial waters of the other contracting party. By a convention of 1870, the mixed Courts established by the Treaty of 1862, for the decision of questions of slave trading, were abolished; and vessels captured were directed to be taken to the nearest ports of their own country for adjudication.

*PIRACY.***THE UNITED STATES v. SMITH.***Temp.* 1820.

[5 WHEATON, 153.]

Case.] In 1819, Thomas Smith was indicted before the Circuit Court of Virginia for piracy. Smith and others formed part of the crew of a private armed vessel commissioned by the Buenos Ayres Government, a colony at war with Spain; they

mutinied, seized another private armed vessel, commissioned by the government of Artigas, also at war with Spain; after appointing officers to the latter vessel, they proceeded on a cruise in the course of which they plundered and robbed a Spanish vessel. The Circuit Court was divided in opinion as to whether the prisoner was guilty of piracy, and the question was reserved for the opinion of the Supreme Court.

Judgment.] The first point raised before the Supreme Court was whether an Act of Congress referring to the Law of Nations for a definition of piracy was a constitutional exercise of the power of Congress to define and punish piracy. This was decided in the affirmative. The next point considered was, whether the crime of piracy was defined by the Law of Nations with reasonable certainty. Story, J., in delivering the opinion of the Court laid down that whatever might be the diversity of definitions in other respects, all jurists concurred in holding robbery or forcible depredation on the high seas to be piracy; they universally treated piracy as an offence against the Law of Nations, and its true definition by that law was robbery upon the sea. A final objection as to the sufficiency of the special verdict in regard to the facts, was decided in favour of its sufficiency. The Court, Livingston, J., dissenting, held the prisoner guilty of piracy and punishable accordingly.

The United States v. Smith, 5 Wheat. 153.

Piracy may be defined as the offence of depredating on the high seas without lawful commission. It includes any organization for the purpose of plunder on the sea or by descent from the sea, also murder or robbery on the high seas accompanied by mutiny.

Piracy is an offence *jure gentium*, and the moment a vessel assumes a piratical character, she loses her former nationality and becomes liable to seizure by any public vessel, and her crew to punishment in any Court. But though the pirate may be tried in any Court, and is within the criminal jurisdiction of any State, he must still be tried. The stigma of piracy also attaches to the vessel; but it

would seem that in the case of a merchant vessel used for piratical purposes, it does not attach to the cargo. In the case of the claimants of the *Malek Adhel v. The United States* (2 Howard, 210), a vessel fitted out with an ordinary armament, quite consistent with her use for commercial purposes, was employed by her commander for the purpose of plunder on the high seas, this being done, however, without the knowledge or consent of her owners. It was held that this constituted piratical aggression within the meaning of the United States laws; but the Court held that such acts would not usually involve the cargo.

Piracy is usually the subject of regulation by municipal law, but so far as it is extended by the municipal law of a State beyond the limits of piracy *jure gentium*, it affects only subjects of that State (*mm*).

In the case of *In re Tivman* (5 Best & Smith, 645), it was held that an extradition treaty concluded between Great Britain and the United States, for the delivery up by one nation to the other of all persons charged with piracy committed within the jurisdiction of the latter, did not extend to piracy *jure gentium* committed upon a United States vessel on the high seas, but merely applied to acts made piracy by municipal law; the phrase "within the jurisdiction" being considered equivalent to "within the exclusive jurisdiction," and piracy *jure gentium* being justiciable everywhere.

With regard to property captured by pirates, it is a rule of the Law of Nations, derived from Roman Law, that it must be presumed never to have been divested from its original owners. On recapture no *postliminium* is necessary, and the property vests in the former owner, although salvage may be payable. If not reclaimed by the former owner the property in English Law formerly vested in the Crown, whilst property belonging to the pirates themselves vested in the Lord High Admiral. The distinction, however, between droits of Crown and droits of Admiralty is no longer of any importance.

Besides piracy proper, there are certain offences which are usually classed with piracy. Thus a ship accepting a commission from two powers has sometimes been deemed piratical; but according to the better opinion, it would seem that if the two powers are allied, and she attacks only a common enemy, her conduct is irregular only and not piratical. A natural born subject accepting a commission and committing acts of hostility on the high seas against his native country is deemed guilty of piracy by the municipal laws, both of Great Britain and the United States.

There has sometimes been a disposition to regard as a pirate a subject of a neutral State who accepts a commission from a belligerent to cruise against the enemy of the latter. In 1839, during war

(*mm*) See case of "Le Louis," p. 76.

between France and Mexico, Admiral Baudin, who was in command of the French fleet, issued a notification to the effect that every privateer in the service of the enemy of which the captain and two-thirds of the crew were not Mexicans by birth, would be regarded as pirates and treated as such (*n*). In 1846, during war between the United States and Mexico, President Polk suggested to Congress, that it would be a matter for the consideration of the Criminal Courts, whether holders of letters of marque issued in blank by the Mexican Government and subsequently sold to foreigners, should not be regarded as pirates (*o*). Usage is against regarding holders of letters of marque as pirates, but some writers have suggested the advisability of introducing into the Law of Nations a rule, under which they would be liable to be so treated. In addition to this, a considerable number of treaties exist, containing stipulations against issuing letters of marque to neutrals. The subject has, however, declined in importance since the Declaration of Paris, 1856 (*oo*).

The question as to the position of rebels carrying on war at sea is considered under the cases of the "Huascar," and the "Virginius" (*p*).

THE SERHASSAN PIRATES.

Temp. 1845.

[2 W. ROB. 354.]

Case.] In 1843 complaints arose as to certain acts of piracy committed by a band of pirates infesting the coasts of Borneo and Tangong Dattoo. Information having reached Singapore of the plunder of a trading vessel bound for that port, a pinnace and two cutters were dispatched from H.M.S. "Dido," under the command of Lieutenant Horton, to put down the pirates. Whilst off the coast of Serhassan six prahns, or native boats, were observed approaching the cutters with every indication of hostile designs. On their nearer approach a flag of truce was

(*n*) Ortolan, *Diplomatie de la Mer*,
Vol. I. pp. 219 & 430.

(*o*) *Ibid.* p. 217.

(*oo*) See p. 94, *infra*.

(*p*) See pp. 86 and 89, *infra*.

hoisted and the crews of the prahns were addressed in their native language and their purpose was demanded. In spite of this the prahns continued to advance and attacked the boats. The result of the encounter was that all the prahns were captured. A motion was made to the Court of Admiralty to decree bounty for the capture under 6 Geo. IV., c. 49. The motion was opposed on the ground that there was not sufficient evidence that the crews of the prahns were pirates.

Judgment.] The Court in its judgment, after reviewing the facts of the case, stated that it was sufficient to clothe the conduct of the men with a piratical character if they were armed and prepared to commence a piratical attack upon any other person. That the attack was premeditated was clearly shown by the fact that an ambush was placed on shore to cut off the detachment in case they should land. It could make no difference whether they were inhabitants of that or any other island. Nor could it be imagined that the title of pirate attached solely to persons following an avowed piratical occupation upon the high sea. The bounty was accordingly awarded, but the case was not to be made a precedent for others of the kind, where the circumstances might be different. Every one of the cases must depend on its own merits and upon the locality where the transaction took place.

The Serhassan Pirates, 2 W. Rob. 354.

This case is cited as an illustration of the principle that any aggression by sea on the part of persons without lawful commission may be deemed piratical.

THE "HUASCAR."*Temp.* 1877.

[PARLIAMENTARY PAPERS, 1877, VOLS. LII. AND LXXXIII.]

Case.] In 1877 a revolutionary outbreak took place in Peru. The ironclad "Huascar" was seized at Callao by her crew and some of her officers in the interest of the insurgent leaders. She then cruised off the coast, stopping British vessels, demanding dispatches for the Peruvian Government, and in one case taking a quantity of coal which was not paid for. It also appeared that a British subject was detained on board and compelled to act as engineer. Meanwhile the Peruvian Government had issued a proclamation to the effect that it would not be responsible for the acts of anyone on board the "Huascar." Admiral De Horsey, under these circumstances, summoned the "Huascar" to surrender, and failing this an action was fought, in which the "Huascar" sustained considerable damage but succeeded in escaping under cover of the night. On the following day she surrendered to the Peruvian national squadron. A claim for compensation was made by the Peruvian Government against Great Britain.

Opinion.] The British Government refused to entertain the claim, and the matter having been submitted to the law officers of the Crown, the latter advised, that, inasmuch as the vessel had been taken out of the hands of the proper authorities, and the Peruvian Government had disavowed liability for her acts, she was sailing under no flag, and no redress could be obtained for any acts which she might commit, and that in view of what had occurred the proceedings resorted to by Admiral De Horsey were justifiable. The Peruvian Government also submitted the matter to its law officers; the latter advised that the acts of the "Huascar" were piratical, and the matter was allowed to drop.

The Huascar, Parliamentary Papers, 1877, Vols. LII. and LXXXIII.

With reference to acts committed by insurgents carrying on war by sea, none of their operations can be regarded as piratical after their belligerency has been recognized.

Some difficulty occurs in the consideration of the case of insurgents prior to the recognition of their belligerency. As a body they are unknown to International Law, and therefore at first sight acts committed by them appear to be piratical. But it is only by reason of these acts that their belligerency is recognized. Mr. Hall suggests that insurgents' acts are piratical only when not authorized by a politically organized society, whether the body be such a society or not being a question of fact in each case (*pp*).

THE "CAGLIARI."

Temp. 1857 & 1858.

[PARLIAMENTARY PAPERS, 1857—58, VOL. LIX.]

Case.] The "Cagliari" was a Sardinian steamer, trading between Genoa and Tunis. In 1857, whilst on a voyage from Genoa to Tunis, she was seized by Neapolitan rebels, disguised as passengers. The captain and some of the other passengers and crew were placed under restraint. The rebels then took the ship to Ponga, a small island, where there was a Neapolitan military prison. The prison was broken open and the prisoners liberated. They next proceeded to Sapri, where they were overcome by the Neapolitan troops. The master then resumed authority over the ship and was proceeding to Naples to inform the Neapolitan Government of what had occurred, when he fell in with two Neapolitan frigates. He directed his course towards them, lowered a boat, and having gone on board one of the frigates, seems to have made a voluntary statement and surrender of himself and his vessel. The ship was thereupon taken to Naples and condemned by the Neapolitan Prize Court, whilst the crew, amongst whom were two British subjects, were im-

prisoned on the ground that both ship and crew had been engaged in warlike acts against the Neapolitan Government. This led to remonstrances on the part of Great Britain and Sardinia, and in deference to the pressure which was brought to bear by the British Government the British subjects were, after the lapse of a considerable time, released, and received 3000*l.* as compensation. The ship and the rest of the crew were also surrendered to the British Consul and by him handed over to Sardinia; but the Superior Prize Court at Naples affirmed the principle that the "Cagliari" was liable to condemnation as having been engaged in warlike and piratical acts with the fault of the master. In the course of the negotiations which took place on the subject, the opinion of the law officers of the Crown was taken as to the right of the British Government to interfere on behalf of the British subjects who had been arrested.

Opinions.] In Dec., 1857, the law officers expressed an opinion that it did not appear clear that there was a seizure by force and violence of the ship and crew, and unless that was beyond doubt they could not advise that the Government would be justified in contending that the proceedings adopted towards the two engineers, who were British subjects, were not warranted by International Law.

In reply to further inquiries the law officers advised on the 1st of Jan., 1858, that :—

I. Assuming that the master voluntarily determined to go from Sapri to Naples, and that the engineers knew of this determination and did not object, they must be considered as bound by the master's act and could not contend that the Sardinian captain and his crew had no right to take them to Naples and hand them over to the Neapolitan Government, nor could the British Government contend that the surrender by the captain on the high seas to the two Neapolitan frigates, after the latter had ordered the "Cagliari" to bring-to, would not be binding on the two English engineers.

II. The Neapolitan ships of war had, under the circum-

stances, a right to pursue the "Cagliari" and capture her beyond the territorial jurisdiction of Naples, and even if she had been a British vessel the Government could not have legally demanded her release without any judicial inquiry or legal investigation or proceeding.

III. The "Cagliari" being a Sardinian merchant vessel and no British subject having, as it was presumed, any share or interest in her, the British Government could not object to her seizure if the Sardinian Government did not; and the Sardinian Government could not so complain if the master voluntarily gave up the vessel; by which was meant, not that he merely submitted to necessity, but that of his own free will he assented to her being taken possession of by the frigates, in order that she might be conducted to Naples for the purpose of legal investigation being there instituted into all the circumstances.

The Cagliari, Parliamentary Papers, 1857—58, Vol. LIX. (g).

THE "VIRGINIUS."

Temp. 1874.

[PARLIAMENTARY PAPERS, 1874, VOL. LXXVI.]

Case.] The "Virginus" was a registered United States vessel, but had, in fact, for some time previous to July, 1873, been employed in the service of the Cuban insurgents. She arrived at Kingston on the 9th of that month. On the following morning the Spanish war-ship, "Charrakia," which had followed her from Colon, arrived in the harbour and took up her position near her. The "Charrakia," however, left Kingston on the 16th of July. The "Virginus" remained until the 23rd of October, when she cleared for Limon Bay, Costa Rica; but instead of proceeding there she made for the coast of Cuba, and after

(g) For a careful comment on the above case, reference may be made to Wheaton's International Law, English edition, by A. C. Boyd, pp. 170, 171.

being chased by a Spanish war-ship, put into Port-au-Prince, Hayti, where she shipped a quantity of ammunition. Thence she proceeded again to the coast of Cuba, when she was again chased and eventually captured by the Spanish war-ship "Tornado" on the 1st or 2nd of November. The ship was taken to Santiago de Cuba. Four of her passengers were tried on the 3rd of November, and were shot on the 4th. Later, sixteen British subjects, part of the crew, were shot in spite of the protests of the British authorities, and seven more were detained in prison. Great Britain thereupon declared that she would hold the Spanish Government responsible for any further executions, reserving for the time being the question of the executions which had already taken place. The Spanish Government ultimately agreed to place the surviving British subjects at the disposal of the United States Government, as they were captured on board a United States vessel, and added that the Governor-General of Cuba was instructed to order at once an investigation into the matter, from which it would be seen whether the families of the British subjects sentenced to death had a right to indemnification.

In the course of the negotiations the Spanish Government called attention to the fact that it appeared from the declarations of the captain and some of the crew of the "Virginus," that they had touched at Port-au-Prince in Hayti, and other places in the same island, and had taken on board arms and ammunitions of war; that they had thence proceeded towards the coast of Cuba with the view of landing the arms and ammunition, and that they had on board some of the principal chiefs of the insurrection, and other persons who came to strengthen its diminished forces in the island. On these grounds the Spanish Government contended that both vessel and those on board were liable to be treated as piratical. In spite of this contention, in March, 1874, a demand for compensation was made by Great Britain. No complaint was made on account of the seizure of the "Virginus" or the detention of her crew. The ground of complaint was that, assuming the vessel to have been lawfully

seized and the crew properly detained, there was no justification for their summary execution after an irregular proceeding before a drumhead court-martial. No possible aspect of the character of the "Virginus" and her crew could authorize or palliate such conduct, and there was no pretence for treating the expedition as piracy *jure gentium*. Even if the "Virginus" was to be regarded as a vessel piratically engaged in a hostile or belligerent enterprise, such treatment would not be justifiable. Much might be excused in acts done under the expectation of instant damage in self-defence by a nation as well as by an individual. But after the capture of the "Virginus," and the detention of her crew was effected, no pretence of imminent necessity of self-defence could be alleged, and it was the duty of the Spanish authorities to prosecute the offenders in proper form of law, and to have instituted regular proceedings on a definite charge before the execution of the prisoners. It was maintained that there was no charge known either to the Law of Nations or to any municipal law, under which persons in the situation of the British crew of the "Virginus" could have been justifiably condemned to death. They were persons not owing allegiance to Spain, the acts done by them were done out of the jurisdiction of Spain, they were essentially non-combatants in their employment, and they could not, by any possible construction, be deemed to have rendered themselves liable to the penalty of death. Ultimately the Spanish Government agreed to make compensation to the families of the British subjects who had been executed.

Meanwhile, a question of a somewhat different character arose between the United States and Spain. On the 29th of November, 1873, a protocol was entered into between those Powers, whereby Spain agreed to restore the vessel and the survivors of the passengers and crew forthwith, and further to salute the United States flag on the ensuing 25th of December, unless Spain should in the meantime prove that the ship was not entitled to carry the United States flag. The matter was submitted to the United States Attorney-General for his

opinion, as to whether the vessel was at the time of capture entitled to carry the United States flag. He gave an opinion on the 12th of December, that she was not so entitled, inasmuch as she had not then been registered in accordance with the law of the United States; but he also expressed an opinion that she was as much exempt from interference on the high seas as she would have been if lawfully registered. Spain had a right to capture vessels with an American register and carrying the American flag, found in her own waters assisting or endeavouring to assist the Cuban insurrection, but she had no right to capture such vessels upon the high seas, upon an apprehension that, in violation of the neutrality or navigation laws of the United States, they were on their way to assist the rebellion; she might defend her territory and people from the hostile attack of what was, or appeared to be, an American vessel; but she had no jurisdiction whatever on the question as to whether or not such vessel was on the high seas in violation of any law of the United States.

In the result the vessel was surrendered to the United States authorities in the Island of Cuba on the 16th of December, 1874. On her way thence to the United States she met with bad weather and sunk off Cape Fear.

The Virginius, Parliamentary Papers, 1874, Vol. LXXVI.

The two questions in issue in the case of the "Virginus" were substantially, (1) the treatment of persons, especially subjects of other States, found engaged in furthering an insurrection; and (2) the question of the finality of the flag on the high seas. In regard to the first question, the views expressed by the British Government may be regarded as a correct exposition of International Law on this subject. Even if piratical, such persons were, except under circumstances of imminent necessity, entitled to a regular trial; in addition to which the conduct of those members of the crew of the "Virginus" who were British subjects, and owed no allegiance to Spain, could not under any circumstances be deemed within the limits of piracy. In regard to the question of the finality of the flag, it is necessary to

remember, that had the Cuban insurgents been recognized as belligerents, the public vessels of each combatant would have been entitled to exercise the right of visit and search in regard to neutral vessels on the high seas. In default of a recognized state of belligerency, it can scarcely be maintained that, even on the high seas, the flag is final, and absolutely precludes a state engaged in suppressing an insurrection, from molesting a vessel suspected of aiding rebels. One can only say, that where there is reasonable ground to believe that a vessel is engaged in a hostile expedition, or that it is really owned by subjects of the State concerned, a public vessel of that State may exercise the right of visit and search, and if its suspicions are confirmed, capture the vessel so employed. But the fact of the ship carrying the flag or register of another nation renders additional caution necessary. In this case proximity to the territory threatened would probably be regarded as essential. Compensation must be made for detention on erroneous grounds, and where there is a conflict of evidence the question should be referred to a third party.

THE "CURLEW."

Temp. 1812.

[STEWART'S VICE-ADMIRALTY REPORTS, 312.]

Case.] Shortly after the outbreak of war in 1812 between Great Britain and the United States, the "Curlew," a privateer, was captured by a British war-ship, and brought into Halifax, Nova Scotia. There was not at the time a sufficient number of British war-ships to protect British trade against the enemy, and a petition was presented to the Court that the "Curlew" might be handed over to certain persons with the view to its being converted into a privateer.

Judgment.] Dr. Croke in giving his decision stated that the Court could not accede to the proposal. Both by the Law of Nations, and the municipal law of the country, the power of granting commissions to privateers was vested in the sovereign or his deputy, and no authority to grant such commissions had been transmitted to the Court. By the Law of Nations, if any private subjects cruised against the enemy without such

commission, they were liable to be treated as pirates. Under these circumstances the prayer of the petition was refused.

The Curlew, Stewart's Vice-Admiralty Reports, 312.

Privateers are vessels owned by private persons, but acting in war time as public war vessels under commissions from the State, called letters of marque. The practice of employing privateers dates back to a time prior to the existence of permanent navies. It was subsequently sanctioned by universal maritime usage. It had some advantages, especially in enabling a State, not possessed of a permanent navy, to call into being a temporary maritime force. On the other hand, the object of those who fitted out such vessels was merely private gain, pursued by a system of legalised plunder; and the crews of these vessels, being under little control, were frequently guilty of pillage and outrage. Some attempt to mitigate these evils was made by taking bonds from the owners as security for the appointment of proper officers, and for the good behaviour of the crew. Such vessels were also liable to inspection by public vessels. In the American case of the "*Dos Hermanos*" (10 Wheaton, 306), it was held that under United States law the only claim that could be made by privateers in respect of their prizes was one in the nature of salvage.

The subject of privateering is now of less importance than formerly, privateering having been abolished by the Declaration appended to the Treaty of Paris, 1856, as between the parties thereto. That declaration has since been acceded to by all civilized nations, except the United States, Spain, and Mexico.

In 1870, during the Franco-Prussian war, the Prussians invited private owners to fit out vessels at their own expense, on condition of their receiving a large premium on the destruction of French vessels. The crews and officers were to be furnished by the owners, but the former were to be under naval discipline, while the officers were to wear the naval uniform. The French Government protested to Great Britain, suggesting that what was being done constituted a breach of the Declaration of Paris, but the British Government refused to interfere, holding that there was an essential distinction. Russia proposed a similar system of depredating on English commerce during 1878, when war seemed imminent between the two countries. Mr. Hall suggests that the view of the matter taken by the British Government was incorrect, and that the distinction between the Prussian proposal and privateering proper was merely formal (*r*).

PART II.—WAR.

STEPS SHORT OF WAR.

SILESIAN LOAN.

Temp. 1752.

[DE MARTENS CAUSES CÉLÈBRES, VOL. II. p. 97.]

Case.] In 1744, war broke out between Great Britain on the one side and France and Spain on the other.

For more than a year Great Britain in no way interfered with the commerce of Prussian subjects. Towards the end of 1745 the latter, who had hitherto only engaged in commerce on their own vessels and for their own account, commenced to load entire cargoes on their ships on account of France, while they made use of neutral vessels of other nations to carry their own merchandise. Thereupon several Prussian ships, loaded with planks for France, were captured by the English and subsequently condemned. By the end of 1748 the English had captured eighteen Prussian vessels and thirty-three other neutral ships chartered either wholly or in part by Prussian subjects. By way of reprisal the King of Prussia confiscated certain funds which had been lent by English subjects on the security of the revenues of Silesia, and which he had bound himself to repay by the Treaties of Breslau, Berlin and Dresden, 1742.

Discussion and Opinions.] It was contended on behalf of Prussia, (1) that the arrest of the ships was contrary to the Law of Nature and the Law of Nations; all that could be allowed to England was to permit her war ships to ascertain

that there was no contraband on neutral vessels sailing for Spain or France ; (2) that the British authorities had acted illegally in capturing Prussian vessels returning laden from France, and in taking them into English ports and requiring proof that the goods on board belonged to Prussians ; (3) that the capture of the thirty-three vessels with Prussian goods on board was illegal ; (4) that the goods confiscated were not contraband according to the declaration of two English ministers ; (5) that the English courts had no jurisdiction over neutral property ; (6) that the King of Prussia was entitled to utilize the funds in his hands in order to indemnify his own subjects, even though the funds were hypothecated to British subjects.

The matter was submitted by the British Government to a commission consisting of the judge of the Supreme Court, the King's Advocate-General in Civil Courts, the Procurer-General^(s), and the Solicitor-General. In their opinion on the matter they laid down, as generally received and recognized principles of International Law, the following propositions :—(1) That when two powers were at war, each power had the right of capturing the vessels and effects of the other met with on the high seas ; although property ascertained to belong to neutrals could not be made prize, so long as they preserved their neutrality. Hence it followed : (2) that enemy goods on neutral vessels were liable to seizure, and (3) that neutral goods on enemy ships should be restored. (4) Further, contraband, though belonging to neutrals, was good prize ; (5) before appropriation there must be condemnation ; (6) the only tribunal competent to condemn was the Court of the captor ; (7) all proofs in the matter should, in the first instance, be taken from the vessel seized. (8) Finally, the Law of Nations permitted reprisals in two cases only :—(a) in the case of a violent wrong directed and supported by the sovereign authority ; (b) in the case of

^(s) These are the terms used by De Martens in his account of the case. Presumably the members of the Com-

mission consisted of one of the judges, the Advocate-General, the Attorney-General, and the Solicitor-General.

a denial of justice by all the tribunals and the Sovereign himself in matters admitting of no doubt.

As to the contention raised on behalf of Prussia, that enemy goods were free on neutral ships, the English commissioners reported that the contrary principle was too well established to be open to doubt. As to the seizure by the English of goods alleged to be Prussian and not contraband, it appeared that none of the goods seized really belonged to Prussia; with regard to the character of contraband a mere verbal declaration of any minister, as to what was contraband, could not have the force of a treaty. As to the contentions founded on the freedom of the sea, even those who maintained this proposition in its widest extent, granted that when two nations were at war they had the right to seize one another's property on neutral ships. As to the reprisals formerly made by Great Britain against Spain, in that case the right of the former to compensation had been admitted, the amount fixed and payment promised by a convention; reprisals, it is true, had followed on the non-observance of the convention, but these were only general reprisals, and no debts due to Spanish subjects or effects in British territory belonging to them, had been seized. In the present case the King of Prussia had given his word of honour to pay a debt due to private individuals. This debt was negotiable and a great part of it might have been transferred to subjects of other powers. It would be difficult to find a case where a debt owing to private individuals had been seized by way of reprisal. In addition to this the debt should have been paid off in 1745, whereas Prussia's complaints commenced only in 1746.

In reply to the report of the English Commissioners it was again urged by Prussia that it was contrary to the Law of Nations to capture a neutral vessel on account of a presumption or suspicion of its having enemy goods on board, or to condemn the goods as prize merely in default of proof that they belonged to neutrals. If enemy goods on neutral vessels were liable to seizure so much discussion would arise that there would be no liberty of commerce so long as any two nations of the world

were at war. Most of the commercial nations of Europe had adopted the maxim of free ships free goods, and that rule, together with the rule of hostile ships hostile goods, had become a maxim of the Law of Nations. From the declaration of Lord Chesterfield that notwithstanding that there was no treaty with Prussia, Prussia would be favoured by England in the matter of navigation as much as any other nation, it followed that Prussia was entitled to demand the observance of the principle free ships free goods and hostile ships hostile goods, and was consequently entitled to demand satisfaction for the violation by Great Britain of this principle. As to the question of the King of Prussia's action in regard to the Silesian Loan, it was affirmed by the Prussian Government, that what was due by or to the sovereign or sovereign and government of a nation was also due by or to the subjects, and conversely what was due by or to the subjects of a nation was also due by or to their sovereign or their government; it was hence concluded that the debt due to Prussia wiped out a portion of the Silesian Loan, and it was not by way of reprisals, but by way of compensation, that the King of Prussia was entitled to retain part of the loan in his hands. In reply to the contention that the loan was strictly payable before the Prussian claims were made, it was pointed out that when a loan was made at interest the debtor was never censured for not having paid off the loan on the day fixed, especially when the creditor had not demanded it. As to the possibility of part of the loan having been transferred, the transferees must be deemed to have taken it subject to equities.

The matter was finally settled by the Treaty of Westminster, 16th Jan., 1756, whereby in consideration of Prussia agreeing to pay off the loan according to the original contract, Great Britain undertook to pay Prussia 20,000*l.* in discharge of all claims.

The Silesian Loan: De Martens, *Causes Célèbres*, Vol. II., p. 97.

The principles laid down by the British Government in the above case, on the subject of the rights and liabilities of neutral trade,

may be said to have prevailed until the Declaration of Paris, 1856 (t). The principles also laid down by the British Government in regard to reprisals and the injustice of confiscating private debts to meet public claims met with universal approval, and may be said to represent the existing principles of International Law on the subject.

THE "BOEDES LUST."

Temp. 1804.

[5 C. ROB. 233.]

Case.] Disputes having arisen between Great Britain and Holland, on the 16th of May 1803 an embargo was laid on all Dutch property. The "Boedes Lust," a Dutch vessel, was seized on the 19th of May, and in June war was declared against Holland. On the captors proceeding to adjudication, the property was claimed on behalf of certain persons resident at Demarara on the ground that they were not, either at the time of seizure or of adjudication, in the position of enemies of Great Britain. It appeared that at the time of the seizure under the embargo, Demarara was a Dutch settlement, but the claimants urged that the property had been seized before the actual declaration of war with Holland, and consequently at a time when they were not yet enemies. It further appeared that before the end of the war, Demarara had come again under British control; consequently it was urged that at the time of adjudication the property could not be deemed enemy property.

Judgment.] Sir Wm. Scott in giving judgment stated in effect that the seizure under an embargo was at first equivocal, and if the matter in dispute had terminated in reconciliation the seizure would have been converted into a mere civil embargo and the property would have been restored, but if, as actually happened in the present case, hostilities ensued, then the property became liable to confiscation. In view of the actual facts of the case he pronounced that the property at the time of the capture belonged to subjects of the Batavian Republic; that the subsequent acquisition of the territory by Great

(t) A complete account of these principles will be found on pp. 206, 207, *infra*.

Britain, would not preclude the consequences of their original hostile character; and that a decree of condemnation must be pronounced (u).

The Boedes Lust, 5 C. Rob. 233.

The usual methods of extorting redress, short of war, are retortion, reprisals, embargo, and pacific blockade.

Retortion consists in treating the subjects of another State in the same way as that State has treated one's own subjects. Thus, a tax imposed by one State to the prejudice of the subjects of another State, might be met by a similar course of conduct on the part of the latter. It is commonly laid down that retortion only extends to imperfect rights or mere rights of comity, and not to rights the violation or withholding of which would afford a *casus belli*.

Reprisals consist generally in the seizure and condemnation of the property of another State or its subjects. Such reprisals are usually resorted to, either with the view of keeping property seized as compensation, or in order to enforce redress for an injury. Another form of reprisals consists in the suspension of the operation of treaties.

A hostile embargo is also a form of reprisal, and consists in the provisional arrest of ships found in the harbours or interior waters of a country, in order to prevent their departure. If war follows, the ships are liable to condemnation; if not, they are restored, compensation being made for their detention. Sometimes what is termed a civil embargo is employed. This consists in the similar arrest or detention of vessels found in local waters as a measure of internal safety. This may take place in order to prevent the spread of intelligence as to the condition of a country, or prior to the exercise of *jus angariae*, or in order to protect one's own trade against improper restrictions imposed by foreign nations.

Pacific blockade consists in the blockade of part of the territory or coast line of a State as in actual war, without, however, having recourse to other hostile measures. It is sometimes used as a measure of reprisal to prevent the violation of a state of peace, or to prevent the departure of a squadron or the introduction of troops, while an opportunity is given to the government of the place to explain its intentions.

This form of coercion has been adopted on several occasions during the present century by one or other of the great maritime Powers as a means of extorting redress from less powerful States. It seems to have been first resorted to in the year 1827, when England, France,

(u) The matter was further complicated by the fact that, prior to the Treaty of Amiens, 27th March, 1802, Demarara had been in the possession

of the English, but Sir W. Scott refused to allow this consideration to affect his judgment; p. 250 of the report.

and Russia blockaded the coasts of Greece, with the view of coercing Turkey. Similar measures were threatened in 1880 against Turkey for nonfulfilment of the Treaty of Berlin, but the measure was rendered unnecessary by the success of the Dulcigno demonstration off the Albanian Coast. This was merely a species of moral coercion, each power stationing ships of war off the coast with instructions not to take any active steps.

In 1884 a blockade of a somewhat ambiguous character was declared by France against China. On the 20th of October, 1884, Admiral Courbet declared a blockade of all the ports and roads between certain specified points of the Island of Formosa. The English Government protested against this on the ground that Admiral Courbet had not enough ships to guard the whole coast, and that it was therefore a violation of the principle of the Declaration of Paris, 1856, according to which blockade to be binding must be effectual. In addition to this it was officially stated in the House of Commons that the English Government had refused to recognize the blockade of Formosa as a pacific blockade (*a*).

With regard to the legal character of pacific blockade, it seems indeed probable that this species of coercion will become part of the Law of Nations; but at the present time it cannot be pronounced a definitely accepted institution. As Mr. Hall suggests (*b*), if the blockade is not proclaimed against vessels of all nations, it lacks one of the essential requisites of a blockade proper. If, on the other hand, it is proclaimed against all vessels, the nation proclaiming the blockade arrogates in time of peace rights of interference which hitherto have been admitted only in time of war.

CASE OF DON PACIFICO.

Temp. 1850.

[ANNUAL REGISTER, 1850, p. 281.]

Case.] M. Pacifico was a Jew born at Gibraltar, but in April, 1847, resident at Athens. It is customary in Greece for the people to burn an effigy of Judas Iscariot at Easter time, but in 1847 the police at Athens were ordered to prevent the ceremony. The mob, attributing the order to interference by or on behalf of the Jews, attacked M. Pacifico's house and plundered it. M. Pacifico claimed over 26,000*l.* for damages occasioned by the outrage.

(*a*) See statement of Lord E. Fitzmaurice in House of Commons, April 1, 1885.

(*b*) International Law, 2nd edition, p. 340.

In spite of the fact that M. Pacifico's claim should, in the first instance at least, have been brought before the Greek tribunals, the British Government intervened and required the Greek Government to make compensation. The Greek Government replied that the authorities had used every effort to stop the consummation of the act, and to deliver the authors of it up to justice, and that according to the municipal law both of Greece and other European nations, as well as the requirements of international comity, M. Pacifico ought first to have instituted before the civil tribunals an action for damages against the authors of the transaction.

On the failure of the Greek Government to make compensation, the British Admiral, in the first instance, was instructed to prevent any Greek public vessel from putting to sea; and subsequently Vice-Admiral Parker laid an embargo on all Greek merchant-vessels, and captured and detained all those found upon the sea. The matter was referred to Baron Gros, a mediator despatched by the French Government, but his mission was unsuccessful. Ultimately a convention was drawn up between the two Governments, by which the claim of M. Pacifico was referred to certain commissioners. These, after investigating his claim, awarded him 150*l.*, and the dispute thus terminated.

Case of Don Pacifico, Annual Register, 1850, p. 281.

The high-handed proceedings of the British Government in this case, whilst affording an apt illustration of the use of a method of coercion, short of war, must yet be pronounced a flagrant violation both of International Law and international comity.

DECLARATION OF WAR.

THE "ELIZA ANN."

Temp. 1813.

[1 Dods. 244.]

Case.] During war between Great Britain and the United States, three American ships were captured by the British in

Hanoë Bay, and sent home for adjudication. A claim to the ships and cargoes was made by the Swedish Consul, on the ground that the captures were made within Swedish territory, and that Sweden was at the time a neutral State. The state of things actually prevailing was this:—the conduct of Sweden had for some time previously been of a very unfriendly character in regard to Great Britain; a declaration of war had in fact been issued by the Swedish Government, but it was unilateral only; on this ground it was contended that the two countries could not be considered in a state of war.

Judgment.] Sir W. Scott, in his judgment, held that this contention could not prevail, and that war might exist without a declaration on either side. A declaration of war by one country was not a mere challenge to be accepted or refused at pleasure by the other. It proved the existence of actual hostilities on one side at least, and put the other party also into a state of war, though he might perhaps think proper to act on the defensive only. On this and other grounds the claim of the Swedish Consul was rejected.

The Eliza Ann, 1 Dods. 244.

The truth of Sir W. Scott's reasoning in this case is unquestionable. With regard to modern practice, it seems that the commencement of hostilities is usually preceded by a formal declaration, or by a manifesto issued by the belligerents to neutral powers. The Franco-Prussian War of 1870 was preceded by a declaration handed by M. Benedetti to Count Bismarck. The Russo-Turkish War of 1877 was announced by a formal despatch handed to the Turkish Chargé d'Affaires at St. Petersburg. The relations lately existing between France and China were substantially those of war, France having claimed full belligerent rights as against neutrals in regard to blockade and contraband. The refusal to admit a state of actual war can only be described as a political manœuvre, which altogether failed to obscure the true international relation of the two countries.

EFFECTS OF OUTBREAK OF WAR.

BROWN v. THE UNITED STATES.

Temp. 1814.

[8 CRANCH, 110.]

Case.] On the outbreak of hostilities between Great Britain and the United States, the United States authorities effected a seizure of some timber, which was the property of a British subject, but found within United States jurisdiction. Proceedings were taken for its confiscation as prize of war. In the lower Court a sentence of condemnation was pronounced. On appeal being brought, the Court considered fully the effect of the declaration of war upon British property found there at the commencement of hostilities.

Judgment.] It was assumed in judgment that war gives to the sovereign full right to take possession of and confiscate the property of the enemy wherever found. The mitigations of the rule which modern policy had introduced might affect the exercise of the right but could not impair the right itself. If the Sovereign chose to bring the right into operation the judicial department must give effect to his will. With regard, however, to the effect of the mere declaration of war on enemy property found within the jurisdiction, the Court, after a review of the principal writers on the *jus belli*, came to the conclusion that, though war gave the right to confiscate, it did not of itself operate as a confiscation of the property of an enemy. Hence a United States Court had no power of condemnation, in default of some expression of will to that effect on the part of the State. The sentence of condemnation pronounced by the Court below was, therefore, reversed by the Supreme Court, on the ground that there was no legislative act authorising the confiscation.

Brown v. The United States, 8 Cranch, 110.

According to modern usage the property of a subject of one belligerent found at the outbreak of war in the territory of the enemy, continues under the protection of the law. The withdrawal of such protection would constitute a violation of international faith. But the property may be sequestrated where such a course is necessary in order to facilitate the objects of the war. Even persons who are subjects of the other belligerent are usually allowed to remain, subject to good behaviour; but this is sometimes modified by political or military necessity. Thus, in 1870, all Germans domiciled in the Department of the Seine were ordered to withdraw by the then French Executive.

THE RUSSO-DUTCH LOAN.

Temp. 1854.

[PARLIAMENTARY DEBATES, 3RD SERIES, VOL. CXXXV., 1096.]

Case.] After the conclusion of war in 1814, Great Britain, in consideration of being allowed to retain certain Dutch colonies and dependencies in her possession at the close of the war, undertook to pay a moiety of the loan contracted in Holland by Russia during the war. By the Convention of the 19th of May, 1815, embodying the terms of the arrangement, it was agreed that the payments on the part of Great Britain should cease when the sovereignty of the Belgic provinces should pass from the King of the Netherlands; but it was at the same time provided that the obligation of payment should not be affected by the outbreak of war between the parties. On the separation of Belgium from Holland a new convention was entered into between Great Britain and Russia, whereby, after reciting that the object of the convention of the 19th of May, 1815, appeared to be to afford Great Britain a guarantee, that Russia would on all questions concerning Belgium identify her policy with what Great Britain had deemed best for the maintenance of a balance of power in Europe, and on the other hand to secure to Russia the payment by Great Britain of a portion of her old Dutch Debt, the King of Great Britain engaged to recommend Parliament to

enable him to continue the payments stipulated in the convention. On the outbreak of the Crimean War a motion was made in Parliament to the effect that Great Britain should renounce her obligation to make any further payments, on account of Russia having violated the general arrangements of the Congress of Vienna.

The motion was, however, rejected upon the ground, among others, that "Great Britain being at war with Russia was bound by a regard to national honour to be more than ever jealous of affording the slightest ground for the accusation that she wished to repudiate debts justly contracted with the power which was for the time her enemy" (c).

The Russo-Dutch Loan, Parliamentary Debates, 3rd Series, Vol. CXXXV., p. 1096.

The outbreak of war between two countries, strictly speaking, dissolves all State debts owing by one belligerent to the other; but the above case illustrates the tendency of modern international morality to discountenance the repudiation of liability in such cases.

WOLFF v. OXHOLM.

Temp. 1817.

[6 MAULE & SELWYN, 92.]

Case.] The plaintiff Wolff was a native of Denmark naturalized and resident in England, and had carried on business here in partnership with others. Oxholm, a Danish subject resident in Denmark, was indebted to the partnership. Proceedings were taken at Copenhagen to recover the debt. A cross-suit was instituted to recover a counterclaim. While the suits were pending in 1807 war broke out between Denmark and Great Britain, and an ordinance was thereupon made by the Danish Government, whereby all debts due to English

(c) *Twiss' International Law*, 2nd edition, Vol. II. p. 114.

subjects were sequestrated and ordered to be paid to the Danish Treasury. Oxholm paid the amount accordingly. After the war proceedings were taken in England for the recovery of the debt, the question in the case being the effect of the Danish order of confiscation.

Judgment.] It was stated in judgment that the right of confiscating debts, contended for on the authority of Vattel, was not recognised by Grotius, and was impugned by Puffendorff and other writers; that such confiscation was not general at any period of time, and no instance of it, except the ordinance in question, was to be found for something more than a century. It was accordingly held that the ordinance and the payment to the commissioners appointed under it, constituted no defence to the action, it being declared that the ordinance was not conformable to the usage of nations.

Wolff v. Oxholm, 6 Mau. & Sel. 92.

War does not affect the payment of private debts due from a subject of one belligerent to a subject of the other, except so far as the remedy may be suspended during its continuance.

GRISWOLD v. WADDINGTON.

Temp. 1818,

[15 JOHNSON'S REPORTS, 57.]

Case.] Joshua Waddington and Henry Waddington were partners, the former being an American citizen, residing in New York, and the latter a British subject resident in London. Proceedings were taken to recover a balance of account arising out of transactions between N. L. & G. Griswold and the Waddingtons, during war between the United States and Great Britain. It was sought to make H. Waddington liable.

Judgment.] Spencer, J., in giving judgment, stated that it appeared to him that the declaration of war did of itself work a dissolution of all commercial partnerships between British subjects and American citizens. By dealing with either party no third person could acquire a legal title against the other. In answer to an objection of want of notice of the dissolution, he stated that the declaration of war was of itself the most authentic and monitory notice.

Griswold v. Waddington, 15 Johnson's Reports, 57.

Contracts between the subjects of belligerent States are suspended or extinguished, according to their nature. Among the contracts extinguished is that of partnership, as illustrated by the case of *Griswold v. Waddington*, cited above; the reason being the impossibility for partners to take up the business after the conclusion of the war at the point of abandonment on the outbreak.

No action can be maintained by a subject of one belligerent in the Courts of the other during the continuance of the war. In *Alcinous v. Nigreu* (4 E. & B. 217), an action was brought in an English Court during war between Great Britain and Russia for work and labour rendered by the plaintiff to the defendant. It was objected that the plaintiff was an alien born in Russia, an enemy of the Queen, and residing here without licence. Campbell, C.J., in giving judgment to the effect that the action was not maintainable, stated that the contract was valid, and that when peace was restored, the plaintiff might enforce it in our Courts, but by the law of England so long as hostilities prevailed he could not sue here.

THE "TEUTONIA."

Temp. 1871 & 1872.

[L. R. 3 A. & E. 394; 4 P. C. 171.]

Case.] In April, 1870, a Prussian brig was chartered to carry a cargo of nitrate of soda from South America to England for orders. She arrived at Falmouth on the 10th of July, and the next day she received instructions to sail for

Dunkirk. She arrived off Dunkirk on the 16th, but the state of the tide did not permit her to enter, and she could not have done so until the afternoon of the 17th. On the 16th she was boarded by a pilot, who told the master that war had broken out between France and Prussia. The brig thereupon returned to the Downs, and anchored there on the 17th. On the 18th the master received from the owner of the brig instructions not to go to Dunkirk. The brig put into Dover the next day. On that day France declared war against Prussia. A suit was instituted by the consignees of the cargo for damages for non-delivery at Dunkirk. It was admitted by the plaintiffs that after the formal declaration of war the ship was not bound to go to Dunkirk. The plaintiffs relied mainly on the fact that war was not declared until the 19th.

Judgments.] Sir Robert Phillimore, in giving judgment, held that war might exist *de facto* so as to affect at least the subjects of the belligerent States either without a declaration on either side or before a declaration or with a unilateral declaration only. In view of the facts the learned Judge held that war had in fact broken out or was so imminent as to render Dunkirk an unsafe port for a Prussian vessel, and that the vessel could not have entered the port on the 16th without incurring the penalties of trading with the enemies of her country, and that the master was therefore excused from all liability for refusing to enter.

Another question that arose was whether the master was entitled to any freight on delivery of the goods at Dover. This also was decided in his favour.

An appeal was taken to the Judicial Committee of the Privy Council. The Judicial Committee dissented from the opinion of Sir Robert Phillimore that the ship could not have entered Dunkirk in safety on the 16th, holding that what occurred before the 19th did not amount to an actual declaration of war; but they agreed with him that the master, when he was informed by the pilot of war having broken out, was entitled to pause and take a reasonable time to make further enquiries

and that he did not exceed the limits of a reasonable time in so doing. As to a contention that a distinction arose from the fact of the ship alone being exposed to danger, and that, therefore, a breach of contract had been committed in regard to the non-delivery of the cargo, it was held that no such distinction existed. The appeal was consequently dismissed.

The Teutonia, L. R. 3 A. & E. 394; 4 P. C. 171.

It will be seen on reference to the terms of the judgment on appeal, that the Judicial Committee fully admitted the principle that war may exist without actual declaration, and that a party may, under such circumstances, claim any immunities consequent on war, to which he may be entitled either by the general law, or under his contract. The point on which the Judicial Committee differed from Sir R. Phillimore was only as to whether in fact war could be said to have existed between the parties on the 16th of July. Subject to this difference, the principles laid down by Sir R. Phillimore as to the effect of an actual or impending outbreak of war upon a contract, such as existed in the present case, may be taken to represent existing law on the subject.

TRADING WITH THE ENEMY.

THE "HOOP."

Temp. 1799.

[TUDOR'S LEADING CASES, 921; 1 C. ROB. 196.]

Case.] During war between Great Britain and Holland at the end of the last century, the "Hoop," a British vessel, sailed on a voyage from Rotterdam nominally to Bergen, but really to a British port. The cargo consisted of flax, madder, Geneva and cheeses. The ship was captured for having been engaged in illegal trading. Condemnation of the cargo was

resisted on the following grounds. It appeared that the claimants had traded extensively with Holland, and after the irruption of the French into Holland they had obtained special Orders in Council permitting them to continue their trade. They were subsequently informed by the Commissioners of Customs of Glasgow, under the opinion of the law advisers of the latter, that no further Orders in Council were necessary, and that all goods brought from the United Provinces could in future be entered without any such permit. The claimants consequently caused the goods in question to be shipped at Rotterdam for their account, documenting them ostensibly for Bergen, in order to avoid the enemy's cruisers. Under these circumstances it was urged that the case was entitled to great indulgence.

Judgment.] Sir W. Scott, in giving judgment, stated that by a general rule in the maritime jurisprudence of this country, all trading with the public enemy, unless with the permission of the Sovereign, was interdicted, and this might be affirmed to be a general principle of law in most of the countries of Europe. In this country the Sovereign alone had the power of declaring war and peace, and of removing in part the state of war by permitting commercial intercourse. So a subject of the enemy could not sue in British Courts, unless under particular circumstances, such as his coming under a flag of truce, which *pro hac vice* would relieve him from the enemy character. A state in which contracts could not be enforced could not be a state of legal commerce. Upon these and similar grounds it had been the established law of the Court that trading with the enemy, except under a royal licence, subjected property to confiscation. Sir W. Scott then proceeded to cite numerous cases on the subject, which showed that the rule had been rigidly enforced. Thus, he remarked, that where under an Act of Parliament a homeward trade from the enemy's possessions had been authorized, but protection had not been accorded to an outward trade to the same, though intimately connected with that homeward trade and almost necessary to

its existence,—property employed in such outward trade had been condemned. In order to take the case out of the rule, there must be legal distinctions and not mere considerations of indulgence and compassion, such as were put forward in the present case. There did not appear to be any such legal distinctions, and the claims for restitution were therefore rejected.

The Hoop, Tudor's Leading Cases, 921 ; 1 C. Rob. 196.

It will be seen that, in the case of the "Hoop," the illegal trading consisted in importing into England property purchased during war in the enemy's country. The principles laid down by Sir William Scott, however, also cover cases of property consigned to the enemy's country, or even to places under the temporary occupation of the enemy ; the transmission of such property being considered as a trading with the enemy. In the case of the "Bella Guidita" (cited in the "Hoop"), a Venetian vessel had been chartered by British merchants to carry a cargo of provisions from Ireland to Grenada, which was formerly a British possession, but which had been temporarily subjugated by the French. It appeared that neither Grenada nor other islands similarly captured were considered by the French Government as having fully acquired the character of French possessions. Nevertheless, the judgment of the Vice-Admiralty Court of Barbadoes condemning the cargo was affirmed on appeal.

At the time of the Crimean War, a question was proposed by merchants interested in the Russian trade, as to whether Russian produce brought over the frontier by land, and then shipped in British or neutral vessels, would be subject to confiscation. Lord Clarendon, after remarking that the question turned upon the ownership of the property, stated that if shipped at neutral risk, or after having become *bonâ fide* neutral property, it would not be liable to condemnation whatever its destination ; but if it still remained enemy property, notwithstanding it was shipped from a neutral port and in a neutral ship, it would be liable. It would also be liable to condemnation if it proved to be British property, or property shipped at British risk, and to have been engaged in trade with the enemy. But if there had been a *bonâ fide* and complete transfer of ownership to a neutral, the goods would not be liable to condemnation, notwithstanding that they might have come to that neutral market from the enemy's country either over land or by sea (*d*).

(*d*) *Times Newspaper*, March 25, 1854.

It has been held, however, that the inhabitants of a State placed under the protection of one belligerent, are at liberty to carry on commerce with the enemy. By the Treaty of Paris of the 5th of November, 1815, the Ionian Islands were constituted a free and independent State under the exclusive protection of Great Britain. In the case of "The Ionian Ships" (2 Spinks, Adm. & Eccl. 212), it was held that the trade carried on with Russia during the Crimean War by the inhabitants of the islands was not illegal, they not being either British subjects, allies in the war, or enemies of Russia.

THE "RAPID."

Temp. 1814.

[8 CRANCH, 155.]

Case.] In this case it appeared that a United States citizen had purchased a quantity of English goods in England before the outbreak of war between Great Britain and the United States, and had deposited them on a small island belonging to the English. War having been declared, the owner dispatched the ship "Rapid" to the island in order to bring home the goods. The latter were taken on board, but on the return voyage the "Rapid" was captured by a United States privateer and brought in for adjudication, on the ground of trading with the enemy. The question was raised whether there was such a trading as would subject the property to capture.

Judgment.] Johnson, J., in delivering the opinion of the Court, laid down that in a state of war nation was known to nation only by its armed exterior, every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because the enemy of his country. In the law of prize a hostile character was attached to trade independently of the character of the trader pursuing it; a citizen or ally might be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarked. As to a contention on behalf of the claimant that

there was no trading in the eye of the prize law, the Judge laid down that the object of the rule was to cut off all communication between individuals of belligerent States, and intercourse inconsistent with actual hostility, was the offence against which the operation of the rule was directed. The claimant had no right to leave the United States for the purpose of bringing home his property from an enemy country, much less could he claim it as a right to bring in goods the importation of which was expressly prohibited. The decree of the Court below condemning the cargo was affirmed.

The Rapid, 8 Cranch, 155.

This case is cited as illustrating another aspect of the subject of trading with the enemy, and also as showing the rigid enforcement of this principle by the United States courts. In the case of the "Gray Jacket" (5 Wallace, 342), a vessel was captured by a United States cruiser, whilst engaged in carrying the property of the master, a United States citizen, from the territory of the Confederate States during the American Civil War. A decree of condemnation, pronounced in the Court below, was affirmed on appeal, the Court laying down in judgment that the liability of the property was irrespective of the *status domicilii*, or of the guilt or innocence of the owner. If it came from enemy territory, it bore the impress of enemy property. If it belonged to a loyal citizen of the country of the captors, it was nevertheless as much liable to condemnation as if owned by a citizen or subject of the hostile country, or by the hostile Government itself. The only qualification of these rules was, that where upon the breaking out of hostilities, or as soon after as possible, the owner escaped with such property as he could take with him, or in good faith thus early removed his property with the view of putting it beyond the dominion of the hostile power, the property in such case was exempt from the liability which would otherwise attend it.

THE "NEPTUNUS."

Temp. 1807.

6 C. ROB. 403.]

Case.] During war between Great Britain and Holland, a ship belonging to a subject of Sweden, one of the allies of Great Britain, was captured by a British cruiser whilst on a voyage from a Swedish port to Amsterdam with a cargo of pitch and tar. She was brought in for adjudication, and at the trial the case turned on the effect of a modified permission to trade with the common enemy in innocent articles on the part of an ally in the war.

Judgment.] Sir W. Scott (*dd*), in his judgment, stated that as between allies it must be taken as an implied, if not an express contract, that one State should not do anything to defeat the general object. If one State admitted its subjects to carry on an uninterrupted trade with the enemy, the consequence might be to supply aid and comfort to the enemy, which might prove very injurious to the prosecution of the common cause and the interests of its ally. It was not enough to show that one State allowed this practice to its own subjects; but it must be shown, either that the practice was of such a nature as could in no manner interfere with the common operations, or that such trade had the allowance of the confederate State. The goods were therefore pronounced liable to condemnation.

The Neptunus, 6 C. Rob. 403.

This case is cited as illustrating the application of the rule of trading with the enemy as between allies.

(*dd*) Afterwards Lord Stowell; but it has been thought better in the prior and subsequent cases, to retain the

style borne by the learned Judge at the time of the report.

THE "VENUS."*Temp.* 1803.

[4 C. ROB. 355.]

Case.] The "Venus," a British vessel, had gone to Marseilles under a cartel for the exchange of prisoners. The master, after discharging his prisoners, took on board three Jews, together with some goods which were made subject to a distinct freight. The vessel was subsequently captured by a British cruiser whilst on her voyage to Port Mahon, and was sent home for adjudication on the ground of having traded with the enemy.

Judgment.] Sir W. Scott, in giving judgment on the case, would not say that if the master had taken on board a few articles for his own petty profit, such an act would in all cases subject the property of the owner to confiscation, but he added that, where goods were taken on board in such quantities and in such manner as to call for the remonstrance of the officers of the ship, it was too much to say that the offence was imputable only to the master. Cartel ships were subject to a double obligation, to both countries, not to trade, and it was only with the consent of both governments that vessels engaged in that service could be permitted to take in any goods whatever. The ship was therefore condemned on the ground of illegal trading.

The Venus, 4 C. Rob. 355.

A cartel ship is one employed for the exchange of prisoners. She sails under a safe conduct given by the commissary of prisoners in the enemy's country. She is free from molestation whilst actually carrying prisoners, whilst going to the enemy's country to fetch prisoners, and whilst returning thence after having taken prisoners there. She is not entitled to protection on a voyage from one port of her own country to another with the object of fetching prisoners to be returned to the enemy. She loses her protection when she departs from the strict line of her special purpose, as when she receives merchandise on board, and also when she affords reasonable cause for suspicion.

POTTS v. BELL.

Temp. 1800.

[8 TERM REPORTS, 548.]

Case.] The plaintiff in this case had effected a policy of insurance on some madder then lying at Rotterdam. The madder was to be shipped on board a vessel called the "Elizabeth," and consigned to the plaintiff's agents at Hull. The policy was effected, and the consignment made after the outbreak of war between Great Britain and Holland. On her voyage to Hull, the "Elizabeth" with her cargo, was captured by a French vessel and condemned. The plaintiff then sought to recover on the policy.

Judgment.] The Court held that the policy was invalid as being in furtherance of illegal trading, it being a principle of the Common Law that trading with an enemy without the king's licence was illegal in British subjects.

Potts v. Bell, 8 Term Reports, 548.

The effect of an outbreak of war on existing contracts and debts has been already described. This case is cited as showing the effect of illegal trading according to English law on contracts made in furtherance thereof. In *Bell v. Reid* (1 M. & S. 726), however, it was held that a policy of insurance entered into by a British subject domiciled in a neutral State, in regard to a ship owned by him, but trading to an enemy port was valid, and could be recovered on.

ANTOINE v. MORSHEAD.

Temp. 1815.

[6 TAUNT. 237.]

Case.] This action was brought upon five Bills of Exchange, drawn on the defendant by his father, a British subject

detained in prison in France during war between that country and Great Britain. The bills were made payable to British subjects, who were in like manner detained prisoners, and were by them indorsed to the plaintiff, who was a French subject and a banker at Verdun, and accepted by the defendant. A verdict having been found in favour of the plaintiff, a rule nisi was moved for on behalf of the defendant, on the ground that the contract was one with an alien enemy, and was, therefore, not merely suspended by the war, but absolutely void.

Judgment.] Gibbs, C.J., in giving judgment, after remarking that the bills were not drawn by an alien enemy, stated that two principles appeared from the cases cited on behalf of the defendant, namely (1), that a contract made with an alien enemy in time of war, of such a nature as to endanger the security or to be against the policy of the country, was void ; and (2), that however valid a contract originally might be, yet if one of the parties to it became an alien enemy he could not sue. In the latter case, the Crown might, during the war, lay hands on the debt and recover it ; but if it did not do so, then on the return of peace the rights of the contracting alien were restored and he might himself sue. Passing to the question as to whether the bills came into the plaintiff's hands by a good title, the learned Chief Justice held that the indorsement to the plaintiff conveyed to him a legal title in the bills on which the king might have sued in the time of war, and this not having been done, the plaintiff might sue after peace was proclaimed. The rule was accordingly refused.

Antoine v. Morshead, 6 Taunt. 237.

This case seems to point to a modification of the ordinary rules as to contracting with an alien enemy. It will be remarked, however, that the bills sued on were not in their creation contracts with alien enemies ; also that the plaintiff even as indorsee could not have maintained an action on them during the continuance of the war.

The effect of this decision is to enable alien enemies lawfully to provide for the wants and necessities of prisoners detained in the enemy country, and to sue on such contracts on the return of peace.

*RANSOM CONTRACTS.***RICORD v. BETTENHAM.***Temp.* 1765.

[3 BURR. 1734.]

Case.] In 1762, during war between Great Britain and France, the English ship "Syren," of which the defendant was master, was captured by the French privateer "Badine." The ship was released on the defendant giving a ransom bill for 300 pistoles to the plaintiff, the commander of the French privateer, and leaving Joseph Bell, the mate of the ship, as hostage. Bell died in prison. Subsequently the present action was instituted on the ransom bill.

Judgment.] It was urged on behalf of the defendant that no such action had been instituted before, that the contract was void on account of the condition of the contracting parties, the plaintiff being at the time of the contract an alien enemy, and that the ransom bill was not an independent contract, the hostage alone being entitled to bring the action. These objections were, however, overruled, and judgment given for the plaintiff; presumably on the ground that such contracts were usually deemed valid amongst other nations, and that the hostage was merely left as collateral security (e).

Ricord v. Bettenham, 3 Burr. 1734.

When a belligerent captures at sea property belonging to his enemy which he is unable to take into port, it is the practice either

(e) The grounds of the judgment are not stated.

to destroy the property, or to release it on a ransom bill being given by the master of the prize, a hostage being also left with the captor for the payment of the ransom. On the acceptance of the ransom bill, the vessel is exonerated from all liability to hostile capture by other ships belonging to the captor's country or his allies, provided she keeps to the course prescribed by the contract, and completes her homeward voyage within the time limited by it. The contract itself insures only against subsequent belligerent capture, and not against the perils of the sea, so that the ransom is due, although the vessel be wrecked on her homeward voyage.

The practice of giving ransom contracts is, however, sometimes prohibited by Municipal Law.

The decision in the case of *Ricord v. Bettenham*, seems to accord with the rules adopted by most systems of Municipal Law which still allow the practice of giving ransom contracts. According to the practice of France and Holland, the captor, though an alien enemy, can in such case sue on the ransom bill. In the former country, on the return of the ransomed vessel, it is the practice of the Admiralty officers to seize and detain her till the ransom is paid (*ee*).

But so far as English law goes, it has since been decided (*Anthon v. Fisher*, 2 Doug. 649, n.), that an alien enemy cannot sue in his own person, even on a ransom contract. In the case of the "Hoop" (1 C. Rob. 201), Sir Wm. Scott remarked, that even in the case of ransom contracts, an alien enemy was not permitted to sue in his own proper person, but payment was enforced by an action brought by the imprisoned hostage in the courts of his own country for the recovery of his freedom. In England the practice is at present regulated by the Naval Prize Act of 1864 (*f*), sec. 45. By this section power is given to Her Majesty in Council to regulate and allow ransom contracts under such conditions as may be thought fit; such contracts if made are to be within the exclusive jurisdiction of the Court of Admiralty; whilst penalties are inflicted in case of the violation of such conditions.

(*ee*) Pothier De Propriété, No. 144.

(*f*) 27 & 28 Vict. c. 25.

*CAPTURE IN WAR.***THE "VENUS."***Temp.* 1814.

[8 CRANCH, 253.]

Case.] This ship and her cargo were the property of certain United States citizens who had settled in Great Britain, and were engaged in commerce there. The "Venus" sailed from Great Britain in 1812, before the declaration of war between the United States and Great Britain could have become known to the shippers. In the course of her voyage she was captured by the United States privateer "Dolphin," and brought in for adjudication. The question in the case was, whether the property of the claimants, citizens of the United States, settled in Great Britain, and engaged in commerce there, which had been shipped before they had a knowledge of the war, but captured after the declaration of war, ought to be condemned.

Judgment.] It was stated in the judgment that the writers on the Law of Nations distinguished between a temporary residence in a foreign country for a special purpose, and a residence accompanied with an intention to make it the party's domicile or permanent place of abode. In the latter case the domicile involved a consequent liability in the event of an outbreak of war. The Court found that the doctrine of the prize courts and the Common Law courts of England were in harmony with these principles. It was therefore held that if a citizen of the United States established a commercial domicile in a foreign country, between which and the United States war afterwards broke out, his property, even though shipped before the declaration of war, would be liable to capture, his residence in the enemy country giving it a hostile character. The property was therefore condemned. The Court, however, only laid down the rule with reference to so much of his property as was connected with his residence in the enemy's country. The converse proposition was also

adopted, that if a belligerent subject acquired a commercial domicile in a neutral State, he would be considered a neutral by both belligerents in reference to his trade.

Mr. Justice Marshall, however, dissented from the view entertained by the majority of the Court.

The Venus, 8 Cranch, 253.

Enemy character in time of war, so far as the liability of ships and goods to capture by sea is concerned, is determined by various circumstances. The primary test is domicile in the enemy's country. This may be a permanent domicile coupled with political status, or it may be a domicile involving merely a civil status (*ff*) as enemy subject. In either case, however, it renders both ships and goods of the person so domiciled, liable to capture by the other belligerent. From a reference made in the case of the "*Diana*" (5 C. Rob. 60) by Sir W. Scott to the case of Mr. Whitehill, it appears that during war between Great Britain and Holland, an English subject arrived at St. Eustatius only a few days before the place was invested by Admiral Rodney's forces. It was held that, though mere temporary sojourn in the enemy's country for the purposes of health or pleasure would not establish domicile or imbue with a hostile character, yet if a person went to a country with the intention of carrying on business there, he acquired a domicile as soon as he established himself, because the conduct of a fixed business necessarily implied an intention to remain permanently. In such a case, therefore, mere recency of establishment will not preclude the acquirement of a hostile character.

Commercial domicile, or having a house of commerce in the enemy's country, renders liable all property connected with that particular establishment, but otherwise leaves the neutral character unaffected (the "*Portland*," cited p. 62, *supra*).

Possession of soil within enemy territory renders liable the produce of the soil, whilst still in the hands of the owner of the soil, even though he be domiciled elsewhere (the "*Phoenix*," p. 123, *infra*).

Engaging in the enemy's trade, or sailing under the enemy's flag or passport, will also attach a hostile character to both ship and goods, subject to the exception set up by the case of the "*Palme*" (referred to on p. 131, *infra*).

With regard to domicile, the broad principle underlying the case of the "*Venus*," viz., that property of all persons domiciled in the

(*ff*) As to the distinction between civil and political status, see p. 61, *supra*.

enemy's country, even though natural-born subjects of the belligerent effecting the capture, is liable to condemnation,—is indisputable. But the propriety of the decision, in view of the special facts of the case, has been questioned. It was suggested by Marshall, C.J., that where a merchant established himself for commercial purposes in a foreign country, he must be presumed to intend to remain there only so long as he could do so without violation of his duty towards his native country, and that when war broke out between the two countries, he must be presumed to intend to withdraw from the country of his adoption. There is no doubt, however, that if he continues in the enemy country, or delays his return, or if there are other circumstances rebutting this presumption, his property becomes thereupon liable to capture.

A qualification of the rule laid down in the "*Venus*" is illustrated by the case of the "*Ocean*" (5 C. Rob. 90). In that case a claim was made on behalf of a British-born subject, who had settled as a merchant at Flushing, but who, on the appearance of approaching hostilities, had taken means to remove himself and return to England. He had been prevented from removing personally by the violent detention of all British subjects who happened to be within the enemy's territory at the outbreak of the war. Sir Wm. Scott in giving judgment stated, that he thought it would under the circumstances be going farther than the principle of law required, to hold that the claimant, by his former occupation and his constrained residence in France, had acquired a hostile character.

In the case of relinquishment of hostile domicile on the outbreak of war, the clearest proof is required by the Courts of the intent to abandon the former domicile, the onus of proof being on the party who sets up such change of domicile. From the case of the "*Indian Chief*" (cited p. 60) it seems, however, that where the change is from an acquired domicile to a domicile of origin, less conclusive evidence of intent to abandon is required by the Court, than in cases where there is a relinquishment of the domicile of origin.

THE "PHOENIX"

Temp. 1803.

[5 C. ROB. 20.]

Case.] During war between Great Britain and Holland, the "*Phoenix*" was captured when on a voyage from Surinam to Holland, and brought in for adjudication. The cargo was

claimed on behalf of persons resident in Germany, as being the produce of their estates at Surinam.

Judgment.] Sir William Scott, in giving judgment, laid it down as a fixed principle of the Court, that the possession of the soil impressed upon the owner the character of the country as far as the produce of the plantation was concerned, whilst this was being transported to any other country, whatever the local residence of the owner might be. In the present case the estates were acquired by descent, and as such they were by no means marked out to any favourable distinction. If they had been a late acquisition, there might have been room for the supposition that they had been acquired whilst the place was in British possession, and that the owner had been induced by that circumstance to form an establishment there under the faith and protection of the British Government. Having fallen by descent on these persons from their ancestors in Holland, these plantations must be considered to carry with them the disadvantages as well as the advantages of the Dutch character. Being the produce of the claimant's own plantation in the colony of the enemy, the property must fall under the general law and be pronounced subject to condemnation.

The Phoenix, 5 C. Rob. 20.

This case illustrates the principle that property which consists of the produce of estates, situated in the enemy's country, is liable to condemnation as enemy property if, at the time of capture, it still remains in the hands of the owner of the soil. This decision was followed in the American case of *Bentzon v. Boyle* (*The Thirty Hogsheads of Sugar*, 9 Cranch, 191). In this case it appeared that the island of Santa Cruz had originally belonged to Denmark, but had been taken possession of by the British forces. Bentzon, a Danish officer and proprietor of land there, withdrew from the island on its surrender and subsequently took up his residence in Denmark. He still retained his estates in the island, and his agent there shipped

some sugar, the produce of the estate, on board a British ship to a commercial house in London on his account. The ship was captured by a United States cruiser during the war between the United States and Great Britain. The cargo was condemned. An appeal was brought against the decree of condemnation, which was, however, affirmed. The Court, in its judgment, stated that the acquisition of land in Santa Cruz bound the claimant, so far as respected that land, to the fate of Santa Cruz, whatever its destiny might be. The general commercial or political character of Mr. Bentzon could not affect the transaction. Although incorporated so far as respected his general character with the permanent interests of Denmark, he was incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, and though as a Dane he was at war with Great Britain and an enemy, yet as a proprietor of land in Santa Cruz he was no enemy, and could ship his produce to Great Britain in perfect safety. Such produce must therefore be regarded as having a hostile character by the United States, and as liable to condemnation.

THE "ANNA CATHARINA."

Temp. 1802.

[4 C. ROB. 107.]

Case.] The "Anna Catharina" was a Danish vessel, and was captured in 1801 by a British cruiser whilst on a voyage from Hamburg to a Spanish port with a cargo of linen, wines and cheese. War existed at the time between Great Britain on the one hand, and Spain and Holland on the other.

The cargo appeared to have been shipped under the following circumstances. In 1799 a contract was made between the Spanish Government of the Caracas and Mr. Robinson, a trader at Curaçoa, for the purchase by the latter of all the tobacco in the warehouses of the Spanish Government at Porto Caballo, La Guayra, and Guyana, payment to be made in flour, dry goods, and specie. Messrs. Sontag & Co., of Hamburg, were entrusted by Robinson with

the carrying out of this contract, Robinson taking one-third of the profits.

It was sought to condemn the cargo on various grounds. In the first place it was contended that, as Curaçoa had passed into the possession of the British Crown, the contract must be deemed illegal, as existing between a British subject and the enemy. It was also contended that the cargo having been shipped under a contract with the Spanish Government must be deemed Spanish property; and finally, that the nature of the contract was such as to impress on the persons carrying it out the character of Spanish traders, and consequently to imbue them with a hostile character.

On the other hand, the property was claimed by Messrs. Sontag & Co. on the ground that the property was really vested in them, in which case as neutral property it incurred no liability; that even if Robinson had become a British subject, yet the contract not having been illegal in its inception could be validly adopted and carried out by a neutral; and further, that the goods could not be considered as the property of the Spanish Government, because, in the event of the Spanish Government not being willing to accept them they were to take "the chance of the market."

Judgment.] Sir W. Scott, in his judgment, after considering the nature of the contract between Robinson and the Spanish Government, which was really the basis of the whole adventure, held that the contract, though not illegal in its inception, yet became illegal when, by the British possession of Curaçoa, Mr. Robinson became a British subject; but he concluded that the illegality did not travel with it into the hands of Messrs. Sontag & Co., on behalf of whom the claim was made, and that, therefore, no liability could be said to be incurred on this ground. On the question as to the character of the property, Sir W. Scott, after reviewing the circumstances, held that as the cargo was going in time of war to the port of a belligerent under a contract to become the property of the belligerent immediately on arrival, the property must be con-

sidered as being in the Spanish Government, and, therefore, as having a hostile character. He added that neither the fact of its being primarily consigned to Messrs. Sontag's agent, nor the possibility of the Spanish Government refusing the goods was sufficient to preclude this liability. On the question whether the contract did not fix on Robinson and those who adopted it, the character of Spanish traders, Sir W. Scott held that a contract of this kind giving Robinson a monopoly of trading rights, taken in conjunction with the fact that he had a resident agent on Spanish territory for the purpose of carrying out the undertaking, imbued him with a Spanish, and, therefore, a hostile character. It was further held that, as Messrs. Sontag & Co. participated in the benefit of this contract, and acted under arrangements made by Robinson, they must take it subject to its legal consequences, among which was that of liability of the cargo to condemnation in the event of capture by an enemy of Spain.

On these grounds, therefore, viz., that the property must be considered as being in the Spanish Government, and that in addition to this the parties must be considered as trading in the character of Spanish merchants, the cargo was condemned, a claim for freight being refused on account of the prevarication of the evidence.

The Anna Catharina, 4 C. Rob. 107.

Some important rules may be gathered from a consideration of the facts and judgment cited above. In the first place the seizure of the property illustrates the liability which enemy property was formerly under, even though found on board a neutral vessel; though this liability no longer exists as between the parties to the Declaration of Paris, 1856 (see p. 207, *infra*). The judgment next contains an important principle as to trading with the enemy. Sir Wm. Scott held that a contract existing between a person domiciled in a place which had passed by conquest into the possession of Great Britain, and a foreign Government at war with Great Britain, became illegal as involving trade with the enemy; but he qualified this rule, by

holding that the transfer of such contract to a neutral, put an end to the illegality accruing on this ground. Another principle deducible from the case is, that a contract giving any person a monopoly of trading rights within the country of an enemy, imbues such person with a hostile character, even though he is domiciled elsewhere. Sir Wm. Scott, indeed, added, "coupled with the fact that he had a resident agent on Spanish soil;" but it would seem that this is almost a necessary incident of such a privilege. Lastly, the case of the "*Anna Catharina*," illustrates the liability of goods carried under a contract, to become the property of the enemy, or of enemy subjects, on reaching its destination. On this subject the rule usually adopted is, that when goods are delivered by a consignor to the master of a ship for carriage to the consignee they become the property of the consignee. In time of peace this rule may be modified by agreement. But in time of war the English and American courts will not recognise any modification of this rule as between a neutral consignor and an enemy consignee, so that in their view property consigned to an enemy is considered in the light of enemy property. According to French law the goods in such case apparently travel at the risk and peril of the person to whom they belong.

The principle established by the Declaration of Paris, 1856, that a neutral flag covers enemy goods, has the effect of modifying the importance of the rules determining liability of property to capture in time of war. Formerly a belligerent was entitled to investigate the character of goods found on board a neutral vessel. Now, as between the parties to the Declaration of Paris, the goods must not only have a hostile character, but must be taken on board an enemy vessel, or whilst engaged in the enemy's trade. This, without in any way overriding the rules indicated above, yet renders them of more limited application.

THE "*VROU MARGARETHA*."

Temp. 1799.

[1 C. ROB. 336.]

Case.] In this case a claim was made by a Mr. Berkeymyer, of Hamburg, to a cargo of brandies, which had been shipped by Spanish merchants and consigned to a Dutch firm. The

shipment took place in 1794, before the outbreak of war between Great Britain and Spain. The brandies were transferred to him *in transitu*, but before arriving at their destination war broke out, and both ship and cargo were captured and brought in for adjudication.

Judgment.] Sir W. Scott, in giving judgment, said that where a state of war was existing or imminent, the property in goods must be deemed to continue till actual delivery in those parties in whom it was vested at the time of shipment. He recognised this as a rule of the Court, in the sense that property could not be converted *in transitu*. If such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect. But the transaction in the present case having occurred before the war, it must be adjudged according to the ordinary rules of commerce, and there being nothing to raise any suspicion as to the *bona fides* of the transfer, the cargo must be restored to Mr. Berkeymyer.

The Vrow Margaretha, 1 C. Rob. 386.

Property consigned by an enemy to a neutral will be held liable to condemnation, unless evidence is furnished that the consignee is the real owner. In order that the goods may escape confiscation, it must be shown that the consignee is bound to accept them, and that the consignor can reclaim them only in the event of the consignee's insolvency during transit.

With regard to assignment of goods *in transitu*, both English and American Courts hold all such assignments during war to be invalid, the probability of their being fraudulently intended being considered so high as to amount almost to a certainty. Transfers *in transitu* up to the outbreak of war are generally valid, but they are invalid when effected in contemplation of war.

In the case of the "Jan Frederick" (5 C. Rob. 128), property purchased *in transitu* from a Dutch subject by a neutral in contemplation of the outbreak of war between Great Britain and Holland was condemned, Sir Wm. Scott laying it down in his judgment that if the contemplation of war led immediately to the transfer, and became the foundation of a contract that would not otherwise be entered into

on the part of the seller, and this was known to the purchaser, even though on his part there might be other concurrent motives, such a contract could not be held good. It was invalid on the same principle as a similar contract made in time of actual war. The object of both contracts was the same, viz., to protect the property from capture, or from the danger of capture, when it was likely to occur; both were for the purpose of eluding a belligerent right either present or expected. Both contracts were framed with the same *animus fraudandi*, and were justly subject to the same rule.

THE "SOGLASIE."

Temp. 1854.

[2 SPINKS, ECC. & ADM. 101.]

Case.] The "Soglasie" was originally a Russian vessel. On the 17th of May, 1854, during the Crimean War, she left Cronstadt with a cargo of wheat for Leith, where she arrived on the 22nd of June. On her arrival at Leith, the ship was seized as enemy property. It was contended that in February, 1854, the "Soglasie" had been sold to Mr. Johann Saraow, a Danish merchant, residing at Messina, when she assumed the Danish flag, and that in June, 1854, there had been a further sale to one Fischer, a merchant at Copenhagen, on whose behalf condemnation was resisted.

Judgment.] Dr. Lushington, in giving judgment, after remarking that Mr. Saraow, as a merchant of Messina, was not entitled to a Danish character, but was a subject of the King of the Two Sicilies, went on to consider the evidence as to the employment of the vessel after the sale to him. As to this, it appeared that she had been constantly employed in the Russian trade, and that she continued in the same course after the sale as before. Moreover, no evidence was furnished as to the payment of the purchase-money. The ship was therefore pronounced subject to condemnation as Russian property.

No evidence being furnished with respect to the cargo, that likewise was condemned. In the course of the judgment, Dr. Lushington remarked that in the present case the transfer was *in transitu flagrante bello*, and all the authorities denounced such a transaction as illegal.

The Soglasie, 2 Spinks, Ecc. & Adm. 101.

From this case it will be seen that the Courts have applied similar rules to the transfer to neutrals, during or on the outbreak of war, of ships originally owned by persons having a hostile character.

A vessel owned by a neutral but manned by an enemy crew, commanded by an enemy master, and employed in the trade of the enemy, is regarded as an enemy ship. A vessel holding a pass from the enemy, or sailing under its flag, is regarded in a similar light. A somewhat curious exception to this rule was set up in the case of the "Palme" (Daloz Jurisprudence Générale, 1872, Part III., p. 94). In this case a vessel sailing under the flag of the North German Confederation, was captured by a French cruiser, during the war between France and Germany, and brought in for adjudication. It appeared that the vessel belonged to Swiss owners, but that, as Switzerland had no maritime flag of her own, the vessel sailed under that of the North German Confederation. Under these circumstances the Conseil d'Etat reversed the decision of the inferior Court, and decreed restitution.

PRIZE AND BOOTY.

THE BANDA AND KIRWEE BOOTY.

Temp. 1866.

[L. R. 1 A. & E. 109 ; 35 L. J., N. S., ADM. 17.]

Case.] The case of the Banda and Kirwee booty sets out the doctrine of the English Courts in prize and booty cases (*g*). Upon the arrival in Calcutta of Lord Clyde, then Sir Colin Campbell, as Commander-in-chief, for the purpose of suppressing the rebellion in India in 1857, he and Lord Canning concerted a plan of military operations, the result of which was that certain columns were organized to co-operate upon the right and left banks of the Jumna, with Lord Clyde's forces in Oude. Various military operations took place, and much booty was taken ; the bulk of this, the Banda and Kirwee booty, being taken by General Whitlock's forces. Colonel Keating's regiment claimed to be reckoned among the actual captors of that booty. That regiment had throughout the whole of the operations formed part of General Whitlock's force, and was under his orders, but was not present at the capture. It was proposed that a lump sum should be made of all the booty taken, and that this should be divided among the forces engaged. This proposal was objected to by the prize agents of General Whitlock's forces, who claimed the whole of the Banda and Kirwee booty, which amounted to the sum of £720,000, on the ground that they were the actual captors of it. The matter was ultimately, under the provisions of 3 & 4 Vict. cc. 65 & 22, and an Order in Council of June, 1864, referred to the Judge of the Court of Admiralty.

Judgment.] A very long and elaborate judgment was delivered by Dr. Lushington in the matter, containing, among others, the following propositions :—

(*g*) As to the distinction between Booty and Prize, see p. 138, *infra*.

The Court of Admiralty had no original jurisdiction in prize matters. That which it did possess was derived from a royal proclamation issued at the outbreak of war, and a command issued by the Crown to the Court authorizing it to deal with matters of prize. The Court had no jurisdiction with respect to booty till 3 & 4 Vict. c. 65, which enacted that the Court should proceed in matters of booty in the same way as in prize cases. But this enactment only referred to the procedure to be adopted, and did not assimilate the principles on which the distribution was to take place.

The effect that previous prize and booty decisions and grants ought to have upon the judgment of the Court was then considered. As to naval decisions, it was held that none of them ought absolutely to govern the judgment in the present case. There was an essential distinction between naval prize and booty, arising from the fact of one capture being on land and the other at sea. As to booty, that belonged primarily to the Crown, but the Crown usually disposed of it amongst the troops engaged in such proportions as its advisers might recommend. This was now expressly laid down by the statute 2 & 3 Will. IV. c. 53. What troops were to be considered as those engaged in the captures, was a question on each occasion for the Treasury. All prize taken in war also belonged to the Crown, but for a century and a half the Crown had been in the habit of granting the prize, after condemnation, to the captors. This not only provided a stimulus to every kind of duty, by furnishing gratuities as incidental to certain services, but also had the effect of restraining pillage.

With regard to the rules governing distribution of prize money, when a ship was taken at sea the actual captor was the ship to which the prize struck its flag. The whole of the ship's crew shared in the prize, notwithstanding that they might not all have been on board at the time of the capture, or that the prize might have been taken out of sight of the ship, and at a great distance from it by the ship's tender, or by a boat's

crew detached from the ship. The rule which attributed the capture to the ship rested on practical convenience.

As to claims made on the ground of joint capture, actual capture was what the Court always looked to in the adjudication of naval prize, except in two cases where the application of constructive capture prevailed, viz., association and co-operation. Vessels claiming to be joint captors on the ground of association, claimed in virtue of some bond of union existing between themselves and the actual captors. Those claiming on the ground of co-operation, claimed in virtue of support rendered on the particular occasion to the actual captors.

If vessels had been associated together, a capture made by one enured to the benefit of all, and it was not necessary that the capture should have been made in the sight of the others, or that the others should have actually co-operated, beyond such co-operation as was implied in the fact that each, at time of capture, was engaged in discharging the part assigned to it in their common service. Association was recognized in the case of vessels told off by superior authority for the purpose of cruising together, or maintaining a blockade; or in the case of vessels temporarily associated under the orders of the senior of their respective commanding officers for the purpose of chasing and capturing prizes. Community of enterprise did not of itself constitute association; and it was equally insufficient if the bond of union, though originally well constituted, had ceased to be in force at the time of the capture. Even vessels, which, in being detached to cruise between certain points, received orders "to join the fleet occasionally for communication," would, in Lord Stowell's opinion, be deemed temporarily dis severed from the fleet, so that no joint sharing would exist between them.

A vessel unassociated with the actual captor must, in order to substantiate a claim as joint captor by co-operation, prove that in the course of the chase it was in sight of both the prize and the captor, under circumstances to cause intimidation to the prize and encouragement to the captor. In the case of

the vessel in sight being one of the Government vessels a presumption was raised that it was there under circumstances to cause such intimidation and encouragement, but this presumption might be rebutted. Diversion of the prize, however, did not constitute co-operation.

The result of the prize decisions appeared to be as follows :— They declared actual capture to be the rule, joint capture the exception, admissible only in certain cases ; they laid down the principle which seemed to underlie all cases of joint capture, viz., encouragement to the friend, intimidation to the foe ; they exhibited two modes in which that principle might take effect, association and co-operation ; and finally they enforced the necessity of assigning some limits as to what constituted co-operation.

Passing then to the subject of booty, Dr. Lushington, after examining the principal cases relating to this subject (*gg*), proceeded to state the conclusions of law to which he had come on the subject. The general rule for the distribution of booty was the rule of actual capture. But to confine the enjoyment of booty to those who had actually laid hands upon the property would be simply to give legal sanction to lawless plundering ; on the other hand, to distribute it indiscriminately would be to discourage personal efforts, and in many cases to dissipate the booty till it became insignificant. The course which was most analogous to the rule of the naval service, most in conformity with military usage, and most likely to work satisfactorily in the case of an army consisting of several divisions, was to draw the line between division and division.

Those who claimed to share in booty on the ground that they were associated with the actual captors, must prove a strict association. The association must be military, not

(*gg*) Cases arising out of the campaign in Egypt, 1801 ; the Mahratta War, 1803 ; the Battle of Waterloo, 1815 ; the Deccan War, 1817—1818 ; the War in Burmah, 1824, 1825, and 1826 ; the War in Bhurtpore, 1825 and 1826 ; the

Expedition against Khelat, 1839 ; the Scinde War, 1843 ; the booty taken at Moulton, 1848—9 ; Delhi, 1857 ; Lucknow, 1857—8 ; and Dhar, 1857. For the facts of these cases the reader is referred to the reports.

political, and the force making the claim must be under the immediate control of the same commander. There were two cases where the above would not apply, one where there was a joint expedition of land and naval forces, the other where the British army was in the field with an army of an allied country. Both of those cases depended on special considerations.

As to co-operation, the service necessary to constitute a claim to joint capture on this ground was a co-operation directly tending to produce the capture in question. What tended to produce the capture it was impossible to define once for all. Speaking generally it could only be said that strict limits of time, place, and relation must be observed. Services rendered at a great distance from the place of capture, acts done long before the capture was contemplated, even though they affected the whole scene of operations, could not be deemed such co-operations as would give a title to a share in booty. Indirect services would also be insufficient.

With reference to the claim on behalf of the late Lord Clyde, the arbitrator proceeded to state that the right of a Commander-in-chief to share in booty taken by his army was analogous to the right of the flag officer to share in naval prize taken by a ship on his station. It might be said generally that an admiral on his station, provided he was *de facto* in command there, was entitled to a share in every prize taken by a vessel under his command. To this right there were two apparent exceptions, viz., 1st, No flag officer commanding in a port in the United Kingdom shared in prizes made by any ship sailing from such port by order of the Admiralty; and, 2ndly, An admiral did not share in prize taken within the limits of his station by a vessel that would commonly be under his command, if the capturing vessel had been delegated for a special independent service, and had for that purpose been detached from the admiral's authority by paramount orders from the Admiralty.

With regard to the right of the Commander-in-chief to share

in booty taken by his troops, no case had been produced where he had shared if he had not been personally in the field; the arbitrator would, therefore, hold that, to be entitled to share in booty, the Commander-in-chief must be in the field. It was not necessary that he should be actually present with the division which made the capture; it was enough that he should be in the field with any part of the army; being in the field with one division, he was in the field with all. But if troops had been placed under the independent command of another, the Commander-in-chief, even if in the field with his army, did not share in booty taken by those troops, although under ordinary circumstances they would be under his command either as having been detached from his army or as operating within the territorial limits of his authority. After a review of the facts of the case, it was held that Lord Clyde was Commander-in-chief over General Whitlock and his troops. That he was in the field was a matter of fact beyond dispute, and his absence from the scene of capture was immaterial. Lord Clyde, therefore, with regard to the booty, fulfilled in all respects the condition of being Commander-in-chief in the field, and in accordance with usage he was entitled to a share in it. With reference to Lord Clyde's staff, in the Indian army the right of the staff to share in booty had always followed that of the Commander-in-chief.

The result of the judgment was that Lord Clyde and his staff, personal as well as general, was held entitled to share in the booty; subject to that right the whole of the booty was awarded to General Whitlock and his forces, including amongst the latter the troops under Colonel Keating, and any other troops left by General Whitlock on his march, but who at the time of the capture formed a portion of his division and were still under his command. All other claims were disallowed.

The Banda and Kirwee Booty, L. R. 1 A. & E.
109; 35 L. J. N. S. Adm. 17.

Booty may be defined as property seized by a belligerent on land, irrespective of its use, because it is the property of his enemy. The term is in common use applied to arms and ammunition, but it is strictly applicable to all property that can be appropriated. The term prize is generally confined to captures made at sea.

The principles governing the distribution of booty and of prize may be gathered from the summary of Dr. Lushington's judgment given in the text.

It only remains to add a word on prize Courts and their procedure. In time of war Courts are established in belligerent countries for the purpose of adjudicating on questions of prize. The forms of procedure vary in different countries, but the law administered by the Courts is in all cases International and not Municipal law. The functions of Prize Courts are briefly:—(1.) To decree condemnation in all cases where a prize has been properly made; (2.) To order restoration of all property wrongfully captured, and in such cases to order payment of damages by the captor; (3.) To subject to punishment the members of the crew of either the capturing vessel or the prize, in case of misbehaviour. A decree of condemnation has the effect of vesting the enemy property taken in the captors, subject to a distribution between them on the principles indicated above. It has a similar effect on contraband belonging to neutrals, and on property of neutrals consigned with the view of breaking blockade.

A Prize Court may not be erected in neutral territory, but a ship or cargo may be condemned while lying in a neutral port. In the American case of *Jecker v. Montgomery* (13 Howard, 498), it was laid down that all captures *jure belli* enured for the benefit of the Sovereign under whose authority they were made, and that his Courts alone could adjudicate on them; but at the same time it was held that a Prize Court could always proceed *in rem* whenever the proceeds of the prize could be traced into the hands of any person whatever. Modern practice, however, discloses a tendency on the part of neutrals to impose strict limitations on the admission of prizes into neutral ports.

The procedure in England under the Naval Prize Act, 1864 (*h*), is shortly as follows. The captor of a prize in the first instance delivers her into the custody of the marshal of the Court; the ship's papers are brought into the registry; a monition issues citing all persons to show cause against condemnation; three or four of the principal persons belonging to the captured ship are brought before the Court and examined on the standing interrogatories. After the return of the monition, the Court, on production of the examinations and the

ship's papers, proceeds to condemnation or restoration. The Court may direct further proof to be adduced where it appears doubtful whether the ship is good prize or not. Any person claiming an interest in the ship can enter a claim at any time before final decree. The Court can, if it thinks fit, order appraisement of the captured ship, and direct restoration to the claimant on his giving security to the amount of the appraisement; it can also order the prize to be sold, where it appears advisable on account of its condition, or after condemnation. Any number of small armed ships not exceeding six, captured within three months before the proceedings, can be included in one adjudication. The Court can call upon the captor to proceed to adjudication.

These provisions apply both to prize vessels and cargoes; but, so far as relates to the custody of the ship and the examination on the standing interrogatories, they do not apply to ships of war taken as prize.

THE "FLAD OYEN."

Temp. 1799.

[1 C. ROB. 135.]

Case.] During war between Great Britain and France at the end of the last century, the "Flad Oyen," a British ship, was taken by a French privateer, and carried into the port of Bergen. She there underwent "a sort of process" which terminated in a sentence of condemnation pronounced by the French Consul. Under this sentence she was asserted to have been ultimately transferred to the claimant, who bought her at a sale by public auction. It appeared that the purchaser stood in the capacity of general agent at the place for the French nation, and in this capacity acted also as vendor.

From the general terms of the report, which is however very meagre, it would seem that at a subsequent period, presumably

on recapture, an application was made by the original British owner for restitution, on the ground that there had never been a regular sentence of condemnation by a competent prize court.

Judgment.] Sir W. Scott, in giving judgment, stated that by the general practice of the Law of Nations a sentence of condemnation was usually deemed necessary to transfer the property in prize, and that a neutral purchaser in Europe during war looked to the legal sentence of condemnation as one of the title deeds of the ship if he bought a prize vessel. The learned Judge stated his belief that there was no instance in which a man, having purchased a prize vessel of a belligerent, had thought himself quite secure in making that purchase merely because the ship had been in the enemy's possession twenty-four hours, or had been carried *infra præsidia*; the contrary had been more generally held, and the instrument of condemnation was amongst those documents which were almost universally produced by a neutral purchaser. It was also necessary to show that the vessel had been, in a proper judicial form, subjected to adjudication. It was the first time that an attempt was made to impose upon the Court a sentence of a tribunal not existing in the belligerent country; and in order to be sufficient it must be shown that it was conformable to the usage and practice of nations. It would not be enough to show that, on mere theory, a prize tribunal might sit in a neutral country without also showing that such a proceeding was sanctioned by the universal practice of mankind. The efficacy of such a mode of proceeding could not be admitted because one nation had thought proper to depart from the common usage of the world, and general theory gave it a degree of countenance independent of all practice from the earliest history of mankind. As it appeared that no sentence of this kind had ever been produced before, and that in the present case it was put forward by one nation only, nothing more was necessary to show that it was the duty of the Court to reject such a sentence as inadmissible.

An order was, therefore, made for restoration of the ship to the British owners upon the usual salvage.

The Flad Oyen, 1 C. Rob. 135.

The principle of this case is that the property in a prize is not changed in favour of a neutral vendee or recaptor, as against the original owner, until it has been condemned by the sentence of a Court of competent jurisdiction belonging to the sovereign of the captor.

Jurists have differed in opinion as to when the title to prize becomes complete. According to some writers, the prize vests in the State of the captor at the moment of the capture; according to others, the title is not complete until after twenty-four hours' possession. Others again hold that the property is not divested until the prize has been brought *infra præsidia*; whilst finally, some hold condemnation to be necessary. The question is not likely to arise except as between the original owner and a recaptor, or the original owner and a neutral purchaser. By modern usage it seems that, in order to bar the claim of the original owner as against a neutral purchaser or a recaptor, there must be a judicial inquiry by a competent prize Court, followed by adjudication. Until this takes place, the right of property is in abeyance, and no good title can be given by the captor.

THE GERMAN CONTRACTS FOR CUTTING WOOD IN FRENCH FORESTS.

Temp. 1871.

[HALL'S INTERNATIONAL LAW, 2ND EDITION, p. 449.]

Case.] During the Franco-Prussian war of 1870 the German Government entered into contracts with certain persons for the cutting of wood in the French forests. Payment was made in advance, but the contracts were not completed at the time of the treaty of peace between the two Powers. Under these circumstances the contractors urged that the German Government being within their rights in the

making of the contracts, the French authorities ought to have allowed them to complete the cutting. The French Government held that the restoration of the Government had annulled the contracts, and they made in the supplementary convention of the 11th of December, 1871, a declaration to that effect, which was treated by the Germans as a correct statement of law.

The German Contracts for cutting wood in French Forests, 1870; Hall's *International Law*, 2nd Edition, p. 449.

This case illustrates the principle that, although acts done in a country by an invader cannot be nullified in so far as they have produced effects during the occupation, they become inoperative so soon as the legitimate government is restored.

The doctrine of Postliminium, which, under the influence of the text writers, has been imported from Roman Law into International Law, is a legal inference, by which persons or property captured by the enemy are presumed to be restored to their former condition, on the withdrawal of the enemy's control. With regard to persons, the right of postliminy takes effect either on escape to their own or to neutral territory; but it does not avail prisoners confined on a belligerent war-ship or prize in a neutral port. Movable property, taken on land, reverts to its original owner only if recaptured speedily, or, as is usually laid down, within twenty-four hours, otherwise the property belongs to the captor. With respect to immovable property captured in war, the title of the captor cannot be deemed complete until the occupation has been followed by definite appropriation or cession, the best evidence of which will be a treaty of peace confirming his title. Until this occurs, the *jus postliminii* will always operate in favour of the former Government and its subjects, in the event of the territory being restored or recovered. In this case, the Government or its subjects alike are entitled to take their property free from any contracts, grants, charges, or similar incidents attached by the conqueror whilst in possession (*hh*). It was upon this principle that the Courts of the United States decided that grants of territory made by British governors, after the Declaration of Independence, were in-

(*hh*) This case must be distinguished from that in which the conqueror establishes himself as the *de facto* sovereign or government of the country (see case of the Elector of Hesse Cassel, p. 153, *infra*).

valid ; although grants made before that date were expressly saved by the treaty of peace.

With regard to property captured at sea, as has already been stated, the title of the original owner reverts, according to some authorities, only on recapture within twenty-four hours ; according to others, before the prize has been taken *infra præsidia*. Strictly speaking, if the recapture takes place after this, the prize should become the property of the recaptor ; but this result is mitigated in practice by municipal law, in virtue of which the State generally decrees restitution of property belonging to its own subjects on payment of salvage. In the case of the recapture of the property of an ally or co-belligerent, the principle of reciprocity is usually adopted. (For the rules applicable, see note appended to the case of the "Two Friends" below, and the "Santa Cruz," cited p. 146.)

SALVAGE.

THE "TWO FRIENDS."

Temp. 1799.

[1 C. ROB. 271.]

Case.] During the war which prevailed between Great Britain and France at the end of the last century, the "Two Friends," an American ship, was captured by the French, whilst on a voyage from Philadelphia to London, and subsequently rescued by her crew, part of whom were British subjects. She was brought into a British port, and some of the cargo was landed on English soil, pending the settlement of salvage. A salvage suit was instituted, and a protest was made against the jurisdiction of the British Courts over an American ship. It was objected by the defendants that, inasmuch as both ship and crew belonged to the United States, the claim could only be enforced in the United States, and also that the salvors' lien, if any, did not extend to the goods which had been landed.

Judgment.] Sir William Scott, in giving judgment, laid down that every person assisting in rescue had a lien on the

thing saved. The applicants were not to be considered as American sailors, they were not in the condition of American citizens, even if hired as mariners on board the vessel, for the rescue was no part of their general duty as seamen; it was an act perfectly voluntary, in which each individual acted as a volunteer and not as a member of the crew of the ship. Even if they had been American seamen, it did not appear that any inconvenience would have arisen from a British Court of Justice exercising jurisdiction, for salvage was a question of the *jus gentium*, and materially different from the question of a mariner's contract; it was a general claim upon the general ground of *quantum meruit*. As to a contention that different countries might have different proportions of salvage, the learned Judge did not know of any rule on the matter beyond what subjected such matters to a sound discretion distributing the reward according to the value of the services. He desired it to be understood that he delivered no decided opinion as to whether American seamen rescuing an American ship and cargo, and bringing her into this country, might not maintain an *action in rem* in the Court. But if there was British property on board, and American seamen were to proceed here against that, he would think it a criminal desertion of his duty if he did not support their claim. In the present case, no American seaman had appeared, nor was it proved that there was any British property on board; but he had no doubt that the British seamen were entitled to have their services rewarded here, and it would be a reproach to the Courts of this country if they were not open to lend their assistance in such a case. He was, therefore, of opinion that the jurisdiction of the Court was well founded, and that the circumstance of the ship and cargo being American property would not exclude the jurisdiction where there were any British subjects concerned, and where the goods were within the jurisdiction. As to the question whether the jurisdiction was not ousted by the landing of the goods, so far as related to such goods, the learned Judge remarked that whatever might be the law as to

wreck and derelict, it did not apply to those goods which were prize goods, there being no axiom more clear than that such goods when they came on shore might be followed by the process of the Admiralty Court. On the whole case, the Judge was of opinion that the English seamen were entitled to redress in Great Britain, and that the goods being matter of prize, even that part which had been landed was subject to the jurisdiction of the Court, and the protest was therefore overruled and salvage awarded.

The Two Friends, 1 C. Rob. 271.

Salvage, so far as it enters into our present subject, may be defined as compensation made to those through whose efforts either a ship, or her cargo, or the lives of persons belonging to her, have been saved from loss or destruction by fire or by sea, or from capture by pirates or lawful enemies.

With regard to recapture, where in time of war a ship has been captured by an enemy and subsequently recaptured, it is the practice of Great Britain to restore her to the original owner, unless she has been fitted out by the enemy as an armed vessel. Such restitution, however, is invariably made subject to the payment of salvage, which usually amounts to one-eighth of the value of the property, in the event of the recapture having been made by a public vessel. If the recaptured ship has not been taken *infra præsidia*, she is usually allowed to prosecute her voyage.

The United States decree restitution only where recapture has been effected prior to condemnation by a competent Court. The restitution is also subject to payment of salvage. No reference is made in the latest statute on the subject to the event of the vessel having been fitted out by the enemy as a vessel of war, but it is suggested that in this case the discretion given to the Court would enable it to increase the amount of salvage and costs payable.

France decrees restitution in the case of recapture by a public vessel, subject to payment of salvage of one-tenth if twenty-four hours have elapsed, one-thirtieth if they have not. An account of the practice of Holland, Denmark, Sweden, and Spain, on this subject, will be found in Phillimore's *International Law*, Vol. III. ch. vi.

THE "SANTA CRUZ"

Temp. 1798.

[TUDOR'S LEADING CASES, 1047 ; 1 C. ROB. 50.]

Case.] In August, 1796, during war between Great Britain and France, a vessel belonging to a subject of Portugal, the ally of Great Britain, was captured by the French and recaptured by the British, after having been one month in the enemy's possession. A claim was made on behalf of the original owner for restitution ; it was resisted on the ground that the British Courts acted on the principle of reciprocity, and in two similar cases the Portuguese Courts had condemned British vessels.

Judgment.] Sir William Scott, in giving judgment, stated that the law of England on the subject gave the benefit of the rule of restitution to its allies, till it appeared that they acted towards British property on a less liberal principle. The question to be determined was, therefore, simply whether Portugal had applied a different rule under similar circumstances to British property. After reviewing the evidence, his lordship was of opinion that the law of Portugal established twenty-four hours' possession by the enemy to be a legal divestment of the property of the original owner, and that it would have applied the same rule to the property of allies, and this had been actually carried into practice. The ship was therefore condemned.

[In December, 1796, an ordinance was issued by Portugal declaring all recaptures after possession by the enemy for twenty-four hours to be lawful prize. Under these circumstances a second ship captured while that ordinance was in force was also condemned.

In May, 1797, a further ordinance was issued by Portugal directing restitution in such cases. On this ground, in the case of six other vessels captured by the French and recaptured after that date, restitution was decreed.]

The Santa Cruz, Tud. Leading Cases, 1047 ; 1 C. Rob. 50.

The case of the "Santa Cruz" sets forth the rules adopted by the English Courts in the case of the recapture by an English vessel of ships or property belonging to an ally or co-belligerent.

The practice of the United States appears to be identical in this respect with that of Great Britain.

THE "CARLOTTA."

Temp. 1803.

[5 C. ROB. 54.]

Case.] In 1803, during war between France and Great Britain, the "Carlotta," a Spanish ship, whilst on a voyage from Montevideo to London, with a cargo which included some property belonging to British merchants, was successively seized by a British cruiser, captured by a French privateer, recaptured by the British and brought into Jersey. A claim was made for salvage on the recapture. On behalf of the Spanish claimants it was contended that no salvage could be awarded on the recapture of neutral property; that this principle had been deliberately affirmed in the case of the "Jonge Lambert" (i), and that the special considerations in virtue of which some modification of this rule had been admitted during the last war (ii), did not apply to the present case.

Judgment.] Sir William Scott, in giving judgment, stated that the tendency was rather against subjecting property to salvage in such cases, but if any edict could be appealed to, or any fact established, showing that the property would have been exposed to condemnation in the French courts, he should hold it to be sufficient ground to induce him to pronounce for

(i) See pp. 54 & 55 of the Report in notis.

(ii) These special considerations seem to have been the wholesale condemna-

tion, by the French prize courts, of neutral property wherever tainted by any contact with the enemy.

salvage in the particular case. No ground appeared from which it could be supposed that the property would have been condemned, and the claim for salvage was refused.

The Carlotta, 5 C. Rob. 54.

The property of a neutral is not strictly exposed to capture, except for carriage of contraband or breach of blockade. If, therefore, a belligerent captures neutral property, and this is recaptured by the other belligerent, the latter usually restores it without payment of salvage, on the presumption that the Court of the belligerent captor would not have condemned it. But if any facts are shown rendering it probable that the enemy would have condemned it, as that the goods were contraband or destined to a blockaded port, then the property is usually restored on payment of salvage.

The later doctrine of the French Courts on the subject of the recapture of neutral property is illustrated by the judgment in the case of the "*Statira*" (Wheaton's International Law, by Lawrence, 650), decided in 1800. M. Portalis, in giving judgment, stated that the recapture of foreign neutral vessels by public ships gave no title to the recaptors. If a neutral vessel was unjustly seized by the cruisers of the enemy, and recaptured by a French cruiser, she ought to be restored on proof of neutrality. In such cases a foreign vessel would be treated with more favour than a French vessel, on the ground that if a French vessel had fallen into the enemy's hands it would have been lost for ever, unless retaken, whilst in case of a neutral vessel the seizure did not render it *ipso facto* the property of the enemy; until confiscation the vessel lost neither its national character nor its rights.

THE "CEYLON."*Temp.* 1811.

[1 Dods. 105.]

Case.] The "Ceylon," an English East India ship, had been captured by the French during war between Great Britain and France. She was then taken to the Island of Johanna, where she was refitted and supplied with two additional carronades and a French crew of seventy men. She was subsequently taken to the Isle of France, where she was attacked by a British frigate, and afterwards by a British squadron. The "Ceylon," in company with other French ships, succeeded in repelling the attack and destroying the squadron. She was then dismantled and fitted out as a prison-ship, and was used as such, at the time of the capture of the island by the British. Proceedings were instituted by the original owners of the ship for restitution on payment of salvage. It appeared that under the Prize Act, British ships recaptured from the enemy were to be restored upon payment of salvage, unless they had been sent forth as ships or vessels of war by the enemy. The original owners relied upon the fact that the "Ceylon" had neither been commissioned nor sent forth as a ship of war by the enemy, and that she had only been engaged in defensive operations.

Judgment.] Sir W. Scott, in giving judgment, held that in order to come within the exception set up by the statute it was not necessary that the ship should have been actually sent out of port, nor that she should have been regularly commissioned: it was enough to show that she was employed in the public military service of the enemy by those who had competent authority so to employ her.

In view of this a sentence of condemnation was pronounced.

The Ceylon, 1 Dods. 105.

This case is cited as illustrating the exception to the usual rule of restitution on recapture, described in the note to the case of the "Two Friends" (p. 145).

TERMINATION OF WAR.

THE "SWINEHERD."

Temp. 1802.

[MERLIN, RÉPERTOIRE DE JURISPRUDENCE, TIT. PRISE, VOL. XIII., p. 183.]

Case.] The "Swineherd" was an English vessel provided with letters of marque. She sailed from Calcutta for England before the expiration of the five months fixed by the Treaty of Amiens for the termination of hostilities between Great Britain and France in the Indian Seas, but after the news of the peace had reached Calcutta, and after the publication in a Calcutta paper of a proclamation of George III. requiring his subjects to abstain from hostilities after the time fixed. A copy of the proclamation was on board. She was captured within the five months by the "Bellona," a French privateer. The latter ship had been informed by a Portuguese vessel bearing a flag of truce which had put into the Mauritius, by an Arab vessel, and by an English vessel which she had captured, that peace had been concluded; the commander was shown a copy of the "Gazette Extraordinary of Calcutta," containing the proclamation, and he could see that the "Swineherd" was without powder. Notwithstanding this the "Swineherd" was condemned by the French Prize Court, on the ground that a belligerent is not compelled to accept notification of the cessation of hostilities except from his own Government.

The Swineherd, Merlin, Répertoire de Jurisprudence, tit. Prise, Vol. XIII., p. 183.

War is usually terminated by a treaty of peace. Sometimes, though rarely, it is terminated by mere cessation of hostilities, or by the conquest and submission of the whole or part of one of the belligerent States. On the termination of war, the States resume their normal relation towards each other, and acts of hostility ought to cease. In default of any express provision to the contrary by treaty, the *uti possidetis* doctrine prevails, and all property at the time under the control of either belligerent vests absolutely in him.

Where there is a formal treaty of peace, hostilities should cease from its conclusion, unless a future date is fixed for the purpose by the treaty. Frequently, when hostilities affect distant regions, a future date is fixed for their termination. In such case hostilities should cease when duly authorized information of the conclusion of peace has been received; but, as is indicated by the case of the "Swineherd," a military or naval commander is not bound to accept any communication of the termination of hostilities, unless its truth is in some way attested by his own Government.

THE "MENTOR."

Temp. 1799.

[1 C. ROB. 179.]

Case.] The "Mentor," an American vessel, whilst on a voyage from Havannah to Philadelphia in 1783, was attacked off the Delaware, and after shots had been fired on both sides was destroyed by two of H.M. ships. All parties were in complete ignorance of the cessation of hostilities between Great Britain and the United States. After the war, a suit seems to have been instituted against the captain of the English vessel, but no report of this case appears to be extant, although the suit seems to have been unsuccessful. Some ten years afterwards a monition was filed by the same complainant, calling upon the admiral of the station to proceed to adjudication, the object of the proceedings being to fix him with liability for damages in respect of what had occurred.

Judgment.] Sir Wm. Scott, in giving judgment, referred to the time which had elapsed since the transaction occurred.

remarking, that although the Statute of Limitations did not apply to prize causes, yet there should be some rule of limitation provided by the discretion of the Court. After adverting to the fact that ten years previously a suit had been unsuccessfully instituted by the same party in regard to the same subject-matter, and also to the fact that the object of the proceeding was to call to adjudication a person who was neither present at nor cognisant of the transaction, on the ground that the person alleged to have done the injury was acting under his authority, the learned Judge proceeded to lay down the rule of the Court, that the actual wrongdoer was the proper person to fix with liability. He might have other persons responsible over to him, and that responsibility might be enforced, but it was the practice of the Court to have the actual wrongdoer before it. ¶

The learned Judge then expressed the opinion that if an act of mischief had been done by the King's officers through ignorance in a place where no act of hostility ought to have been exercised, it did not necessarily follow that ignorance of that fact would protect the officers from civil responsibility, although if the officer acted through ignorance his own Government ought to indemnify him. He was therefore inclined to think that the determination of the Judge in the former case did not turn upon the fact of ignorance only, but upon all the circumstances of the case.

Having regard to these circumstances, and to the fact that the admiral was absent from the scene of the transaction, and to the lapse of time which had occurred, it was held that the admiral was not liable to be called upon to proceed to adjudication, and he was discharged accordingly.

The Mentor, 1 C. Rob. 179.

This case is cited as containing the opinion of so eminent a judge as Lord Stowell on such points as the limitation of prize suits, the necessity in such cases of having the actual wrongdoer before the Court, and lastly, the effect of ignorance or mistake on liability.

The case also incidentally illustrates the principle, that even though a ship be destroyed, the belligerent may nevertheless be called on to proceed to adjudication.

CASE OF THE ELECTOR OF HESSE CASSEL.

Temp. 1832 circa.

[PHILLIMORE'S INTERNATIONAL LAW, PT. XII., C. VI.]

Case.] Before the invasion of Germany by Napoleon, the Elector of Hesse Cassel held, in the territory of which he was sovereign, certain domains as his private property. He also held certain lands on mortgage from subjects of other German States. After the Battle of Jena he was expelled from his dominions and did not return until the French domination in Germany was put an end to by the Battle of Leipzig, 1813. Hesse Cassel had meanwhile remained for about a year under the immediate government of Napoleon, and was afterwards incorporated into the newly created State of Westphalia. During Napoleon's administration of Hesse Cassel he had confiscated the private property of the Elector, and had also granted a release of their mortgage debts to some of the Elector's mortgagors. After the overthrow of Napoleon the Elector was restored to his dominions, and afterwards sued one of his mortgagors, who pleaded a release by Napoleon. The question was referred to the German Universities, who held that the release was valid so far as the money had actually been paid, and that the Prince could recover only that portion of the debt which had not been paid in money to Napoleon. They drew a distinction between acts done by a transient conqueror and those done after the entire subjugation of a kingdom. In the former case the right of the conqueror was confined to his private acts; in the latter his rights had been ratified by acts of State. Napoleon's right having been of the latter kind, the fact of the property being the Elector's private property

was immaterial, and no consideration of the justice or injustice of the war could be allowed to interfere with this principle. They pointed out that the Prince, from the time of his abdication, had been regarded as an enemy of the new Government, and that his property was therefore liable to confiscation. They refused to admit the doctrine that the Prince retained constructive possession of the debts by reason of his having the acknowledgments of the debtors in his hands. On the conclusion of the war no *restitutio in integrum* could be said to have taken place; and even according to Roman Law the restored owner must take the property as he found it, without compensation for damage suffered in the interval. They also pointed out that the return of the Prince could not be considered as a continuation of his former government, inasmuch as he had not in the meantime been constantly in arms against Napoleon and at last successful by force of arms in recovering his domains.

The Elector, however, in spite of the view so expressed by the principal German jurists, resumed possession of his domains, ejecting, in many instances, persons who had obtained grants of them from the *de facto* sovereign. The proprietors of the Freienhagen estate appealed to the Congress of Vienna, but the Congress refused to give them any assistance.

Case of the Elector of Hesse Cassel, Phillimore's
International Law, Pt. XII., c. VI.

Where there has been a mere occupation of conquered territory, not confirmed by treaty or cession, and not even accompanied by the establishment of any stable government or new authority, except so far as was required by military necessity, then on reconquest or withdrawal, the rights of the original Sovereign and his subjects revert (see case of German Contracts, p. 141).

It is possible, however, that without actual cession a new government or authority may have been set up, and yet, after the lapse of time, a restoration of the original Sovereign or authority may take place. In this case the rules laid down by the text writers as to the

effects of the restoration of authority are :—(1.) All changes made by the intermediate government in the constitution become inoperative ; (2.) The ancient laws and administrative institutions become re-established ; (3.) But no private rights acquired during the foreign *régime* ought to be set aside, provided they are consistent with public order ; (4.) All dispositions of the State property made by the intermediate government are binding ; (5.) The restored Sovereign ought not to make a retrospective use of his power (*j*).

With regard to debts, it may be laid down as a general rule that a *bonâ fide* payment made to the intermediate *de facto* government will extinguish the liability of the debtor. It would seem also that when payment is made even to a transient conqueror, the debt will be extinguished, subject to the debtor being able to prove that the money was actually paid over at the proper time and place, and under threat of compulsion on the part of the conqueror. But the debtor must not have been *in mora*, otherwise the fact of the money having come into the hands of the actual payee will be deemed due to his default, and repayment will have to be made (*k*). Such questions are, however, usually regarded from the point of view of policy rather than from that of law.

CASE OF COUNT PLATEN HALLEMUND.

Temp. 1866 *circa*.

[FORSYTH, CONSTITUTIONAL OPINIONS, 335.]

Case.] At the time of the capitulation of the Hanoverian Army to Prussia in 1866, Count Platen Hallemund was Prime Minister of Hanover. After the annexation the Count continued in attendance on the ex-King, and took up his abode in Vienna. Subsequently he was summoned before the Prussian tribunals to answer a charge of high treason committed after he had ceased to reside in Hanover. By the law of Prussia, Prussian subjects can be prosecuted for high treason committed abroad. Exception was taken to the jurisdiction of the Court on the ground that Count Platen was not a Prussian subject. The matter was submitted to two German

(*j*) Heffter *Europäisches Völkerrecht*, § 188.

(*k*) Phillimore *International Law*, Vol. III. p. 829.

jurists, Professor Zachariaë of Göttingen and Professor Neumann of Vienna. These maintained that the mere forcible conquest of a country did not create the relation of sovereign and subjects between the conqueror and the conquered. They laid down that to create such relation, there must be an express or tacit submission to the new government, although the mere remaining in the country after the conquest and performing the duties of a subject would amount to a tacit submission. Whether or not they would make such submission and acknowledge the new sovereign power was a question for the inhabitants themselves, and consequently liberty ought to be accorded them of leaving the country if they chose. This opinion was, however, not acted on by the Court before which the case came, and the Count was sentenced, *in contumaciam*, to fifteen years penal servitude.

Case of Count Platen Hallemund, Forsyth, Constitutional Opinions, 335.

The case of the "Elector of Hesse Cassel" raises the question as to the proprietary rights of a conqueror who establishes a new *de facto* government in the place of the original authority. The case of "Count Platen Hallemund" raises the question as to the personal relation of such a government to the original inhabitants. The opinion of Professors Zachariaë and Neumann, no doubt, contains a correct statement of existing principles as to the personal liabilities of the inhabitants of the conquered territory. Unfortunately the conduct of the conqueror is apt to be regulated by other considerations than those of legality, and, as in this case, even courts of law are found to defer to the feeling of resentment entertained by a powerful prince. Still it may be laid down as a principle of political morality, that although the conqueror in such a case has absolute sovereign power over the conquered State, he ought not to interfere either with the private rights of the inhabitants or their persons. In the American case of *Johnson v. M'Intosh* (8 Wheaton, 588), Marshall, C.J., in delivering the judgment of the Court, laid down that conquest gave a title which the Courts of the conqueror could not deny, whatever the private and speculative opinions of individuals might be respecting the original justice of the claim which had

been successfully asserted. Although title by conquest was acquired and maintained by force, and its limits were prescribed by the conqueror, yet humanity, acting upon private opinion, had established as a general rule, that the conquered should not be wantonly oppressed, and that their condition should remain as eligible as was compatible with the objects of the conquest. Most usually they became incorporated with the victorious nation. Where this was practicable, humanity demanded, and a wise policy required, that the rights of the conquered to property should remain unimpaired, that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections and united by force to strangers.

PART III.—NEUTRALITY (I).

NEUTRAL TERRITORY.

THE "ANNA."

Temp. 1805.

[5 C. ROB. 373.]

Case.] During war between Great Britain and Spain a Spanish ship, sailing under American colours, with a cargo of logwood and specie, was captured whilst on a voyage from the Spanish Main to New Orleans, by the "Minerva" privateer near the mouth of the River Mississippi. On the case coming

(I) It may be of assistance to the reader in studying the cases following, to remember that the Law of Neutrality includes two main topics, one dealing with the rights and obligations of the belligerent and neutral States as between themselves; the other with the relations of the belligerent State towards neutral individuals. Amongst the principal rights of a neutral State we may enumerate the right to the inviolability of its territory, and to a compliance by either belligerent with its municipal regulations made in preservation of its neutrality (see the cases of the "Anna" and the "Twee Gebroeder," and for a more complete enumeration of neutral rights, Holland, *Jurisprudence*, p. 303). The right in regard to one belligerent naturally involves a duty towards the other. The duties of a neutral State seem to group themselves under two heads, one dealing with what the State must abstain from doing itself (see the case of the Swedish Frigates and note thereon); the second dealing with obligations which the neutral State must enforce on its own subjects and subjects of the other belligerent within its territory.

The more important obligations of this class, are those of preventing the issue of commissions (see the case of *M. Genêt*), of preventing the preparation of hostile expeditions (see the *Terceira* affair), and of preventing the construction or outfit of ships of war (see the case of the "*Alabama*" and following cases), and of preventing its territory from being used as a base of operations (see the case of the "*Shenandoah*"). It is also bound to prohibit within its territory illegal enlistment, active or passive, or the participation by its subjects in hostile acts towards either belligerent (see the case of *Gideon Henfield* and cases following). The fulfilment of these obligations is usually secured by provisions of municipal law (see *Excursus on Neutrality Laws*). Finally, the relation of the belligerent State towards neutral individuals includes an account of the liabilities of neutral trade, in the matter of the carriage of hostile goods on neutral ships, or neutral goods on hostile ships, the carriage of contraband, the breach of blockade, and the taking part in a trade closed to the neutral in time of peace (see cases under these heads).

before the English Prize Court a claim to ship and cargo was made by the American ambassador, on the ground that the ship was taken within the jurisdiction of the United States, at the distance of one and a half miles from the western shore of the principal entrance to the river, and within view of a fortified post, where an officer of the United States was stationed. As a matter of fact it did not appear that the actual capture took place within three miles of this fort, but it did appear that it took place, within three miles of some small mud islands, composed of earth and trees drifted down by the river, which formed a kind of portico to the main land.

Judgment.] Sir W. Scott laid it down in his judgment as a well known rule, "*terræ dominium finitur ubi finitur armorum vis*," and stated that since the introduction of firearms that distance had been recognized to be about three miles from the shore. His lordship held that the three mile limit must be reckoned from the islands, these being the natural appendages of the coast on which they bordered, and on this ground restitution was decreed; the reprehensible conduct of the captors being visited with costs and damages.

The Anna, 5 C. Rob. 373.

The principle of the inviolability of neutral territory was one of the earliest restraints placed upon belligerent operations. The rule does not appear to have been at first very strictly observed. Thus, in the year 1793, the French frigate "Modeste" was captured by the English in the harbour of Genoa; no apology was offered for the violation of neutral territory, nor was the captured vessel restored (m). In the same year, however, the "Grange," a British ship, having been captured by the French in Delaware Bay, was, on application being made to the American Government, restored, on the ground that the inviolability of neutral territory protected the property of belligerents when within it (n).

The right of neutral territory extends to the distance of three miles from the nearest shore.

(m) Hall's International Law, 2nd edition, 560.

(n) Kent's International Law, 303.

The Court of the belligerent effecting the capture ought, under such circumstances, itself to decree restitution. In addition to this, if the captured vessel in such case comes within neutral jurisdiction, the neutral State ought to cause restitution to be made, unless, perhaps, in the case, suggested by Wheaton, of the vessel having been previously carried *infra præsidia* of the enemy's country, and condemned by a competent Court (*o*). Ortolan, however, suggests that even in this case restoration should be made (*p*).

Where a neutral fails in a proper case to restore a vessel captured in violation of its neutrality, the injured belligerent has a right to demand compensation from the neutral. The limits of this right are indicated in the case of the "General Armstrong" (cited below, p. 162).

THE "TWEË GEBROEDER."

Temp. 1801.

[3 C. ROB. 336.]

Case.] During war between Great Britain and Holland, several vessels were captured by the British in the Groningen Watt, on the ground that they were bound for Amsterdam then under blockade. The Watt is an arm of the sea, lying between East Friesland and Groningen. A claim for restitution was made by the Prussian minister on the ground that the capture took place on what was alleged to be Prussian territory, Prussia being at the time neutral. Condemnation of the ships was decreed, it being held after a review of the facts, that the capture was not made on neutral territory.

A question was also raised as to whether the capture was not invalidated, by reason of the belligerent ship having passed over neutral territory *animo capiendi*.

Judgment.] Sir Wm. Scott, in his judgment, after giving an

(*o*) Wheaton's International Law by
Lawrence, p. 725.

(*p*) *Diplomatie de la Mer*, Vol. II.
p. 303.

account of the history of the jurisdiction over the place, which it is unnecessary to insert here, laid down the following important principles with regard to the inviolability of neutral territory, viz., (1) the act of a war vessel passing over neutral territory without violence was not considered a violation of the rights of that territory; (2) the granting of a passage to troops of a belligerent through neutral territory would afford no ground of complaint to the other belligerent; (3) the mere passage of a ship over waters claimed as neutral territory would not invalidate an ulterior capture, unless the passage was an unpermitted one over territory where permission was regularly required, or one under permission obtained on false representation.

The Twee Gebroeder, 3 C. Rob. 336.

It is necessary to remark that at the present day, to allow passage of belligerent troops over neutral territory would probably be regarded as a violation of neutrality, and if the other belligerent chose so to regard it, as a *casus belli*. In other respects the principles laid down by Sir Wm. Scott may still be said to hold good; though as was decided in the other case of the "*Twee Gebroeder*," if the capturing vessel is actually lying within neutral territory, even though the capture is made by boats outside, the capture is invalidated.

THE "TWE E GEBROEDER."

Temp. 1800.

[3 C. Rob. 162.]

Case.] During war between Great Britain and Holland four Dutch ships were captured by the British in the Western Eems near the Groningen Watt, by boats sent from H.M. ship "*L'Espègle*," then lying in the Eastern Eems. Restitution was claimed by the Prussian consul on the ground that the vessels were captured within the limits of Prussian territory.

It appeared that the place where the warship herself was lying, was at the most, three miles from East Friesland, and that at low tide it was immediately connected with the land. It was contended that the fact of the vessel herself being stationed within neutral territory infected all captures made by her boats outside.

Judgment.] Sir Wm. Scott, in his judgment, laid down that no proximate acts of war could be allowed to originate on neutral territory ; and such an act as a ship stationing herself on neutral territory and sending out her boats on hostile enterprises was an act of hostility much too immediate to be permitted. Restoration was accordingly decreed, but a claim for costs and damages was refused on the ground that the capture arose from misapprehension and mistake, and not from an intention to violate what was clearly neutral territory.

The Twee Gebroeder, 8 C. Rob. 162.

THE "GENERAL ARMSTRONG."

Temp. 1851.

[ORTOLAN, DIPLOMATIE DE LA MER, VOL. II., p. 300.]

Case.] In 1814, during war between Great Britain and the United States, the American privateer "General Armstrong" was found by an English squadron in the harbour of Fayal, in Portugal. A detachment from the squadron on approaching the privateer was fired upon ; in consequence of which, on the following day, one of the vessels of the squadron took up its position near the privateer, attacked and succeeded in capturing it. Thereupon a claim was made by the United States against the Portuguese Government, for breach of duty in allowing a United States vessel to be captured within Portuguese territory. Portugal resisted this claim on the ground that the captain of the "General Armstrong" had himself engaged in belligerent operations. No

agreement could be arrived at; but in 1851 the matter was submitted to the arbitration of Louis Napoleon, then President of the French Republic.

The arbitrator held that as the captain of the privateer had not applied at the outset to the neutral state, but had used force to repel the aggression, he had himself disregarded the neutrality of the territory, and had released its Sovereign from all obligations to protect him otherwise than by his good offices, and that the Portuguese Government could not from the time of his having done so be held responsible for the results of the collision that had taken place in contempt of its sovereign rights.

The General Armstrong, Ortolan, *Diplomatie de la Mer*, Vol. II., p. 300.

The decision in the above case was based on the principle that a belligerent who, when attacked on neutral territory, elects to defend himself, releases the neutral from all responsibility in respect of the violation of territory.

THE "CAROLINE."

Temp. 1843.

[PARLIAMENTARY PAPERS, 1843, VOL. LXI.]

Case.] During the rebel raids on Canada a small passenger ship, the "Caroline," was made use of by the insurgents for the purpose of carrying arms and forces from the territory of the United States into Canada. The British officer in command determined on attacking the "Caroline" at a time when he expected she would be moored in British territory, near Navy Island, in the Niagara River. When the attack was about to be made, it was found that she had altered her usual moorings, and had shifted to the United States side of the river. Notwith-

standing this the attack was made, the vessel was boarded, and after a short resistance sent down the Niagara. The affair was taken up by the United States Government, and war seemed imminent.

In the negotiations which ensued Great Britain complained that a hostile expedition had been permitted by the United States Government without any effort being made to suppress it; that American citizens had supported seditious movements against Canada, and that one McLeod (*pp*) had been arrested when within United States territory and prosecuted for his part in the affair. The United States Government, on the other hand, complained that the attack was not such as was allowed under the necessity of self-defence; that it was made upon a passenger-ship at night; that it was an invasion of United States territory; and that, though the case had been brought to the notice of the British Secretary for Foreign Affairs, unnecessary delay had taken place in the communication of his decision in the matter. The negotiations lasted over five years, but the matter was in the end settled amicably. The British Government expressed their regret for what had occurred, and that an apology had not been made at the time, and the United States accepted these explanations.

The Caroline, Parliamentary Papers, 1843, Vol. LXI.

This case is cited under neutrality as illustrating the rule that, though neutral territory is generally to be regarded as inviolable, yet overwhelming necessity may justify a departure from this principle. In the negotiations which ensued, the United States admitted this exception, though they called on Great Britain to show that such overwhelming necessity existed (*g*).

(*pp*) McLeod's case is referred to on p. 75.

(*g*) For an account of the Fenian raids on Canada and the action of the

United States authorities, see Wheaton's *International Law* (English edition by Boyd), p. 517.

NEUTRAL DUTIES (A) (qq).

DISPUTE BETWEEN DENMARK AND SWEDEN.

Temp. 1788.

[ANNUAL REGISTER, 1788, 292 & 293 ; PHILLIMORE'S INTERNATIONAL LAW, VOL. III. pp. 229—231.]

Case.] In 1788, during war between Sweden and Russia, Denmark, in accordance with the provisions of a previous treaty to that effect, furnished Russia with troops.

In spite of this, in a declaration of the 23rd of September, 1788, delivered to the Swedish Ambassador at Copenhagen, the Danish Government stated that they considered themselves at peace with Sweden ; that the peace would not be interrupted by the defeat of the Danish auxiliaries, and that Sweden had no ground of complaint so long as the auxiliaries did not exceed the number stipulated for. A counter-declaration was made by Sweden, on the 6th of October, to the effect that the doctrines set up by Denmark could not be reconciled with the Law of Nations, but in order to prevent war the Swedish Government declared themselves satisfied with the declaration that Denmark had no hostile views against their country.

Dispute between Denmark and Sweden, Annual Register, 1788, 292 and 293 ; Phillimore's International Law, Vol. III., pp. 229—231.

Much of the existing law of neutrality is of modern growth. The dispute referred to illustrates the fact that at the close of the eighteenth century, at least, it was not a definitely settled principle of International Law, that a neutral State must not supply troops to either

(qq) It has been thought desirable to treat of neutral duties under three heads : (A) Duties of neutral state in regard to its own conduct ; (B) Duties in regard to the conduct of its own subjects ; and (C) Duties in regard to

the conduct of subjects of either belligerent within its own territory. It is impossible, however, always to keep the two latter topics apart. In the "Alabama" and following cases, they are unavoidably mixed up.

belligerent. There can be no doubt, however, that at the present time it would be considered a flagrant violation of neutrality for a State to supply troops to a belligerent even under treaty. The other belligerent might justly regard this as a *casus belli*.

SWEDISH FRIGATES SOLD TO MEXICO.

Temp. 1825.

[DE MARTENS CAUSES CÉLÈBRES, VOL. V., p. 229.]

Case.] In 1825, during the war between Spain and her colonies, the Swedish Government offered for sale three of its war vessels. They were ultimately purchased by two merchants, who resold them to London houses. It was then discovered that the vessels had been bought on behalf of the Mexican insurgents. The Spanish Secretary of Legation thereupon demanded the rescission of the contract. The Swedish Minister replied that precautions had been taken to prevent injury to Spanish interests, and a power of rescission had been inserted in the contract for sale. Later on the matter was taken up by Russia, and, after several conferences, instructions were given to the officers appointed to take the ships to England to wait for further orders. On account of the delay the English purchasers demanded a rescission of the contract, and the demand was complied with by the Swedish Government.

Swedish Frigates sold to Mexico, De Martens Causes Célèbres, Vol. V., p. 229.

It is not permitted to a neutral State to lend money to either belligerent, to supply either belligerent with troops, to sell any article of war, to allow the passage of troops through its territory, to allow its Courts to decide upon the validity of captures of either

belligerent, or to acquire during the war any conquest made by either party. If a neutral State should deviate from its duty in any of these particulars, a just cause of war would be afforded to the State injured by its conduct. In addition to this, a neutral State is clearly precluded by the Law of Nations, from lending money to either belligerent, or from guaranteeing or promoting any such loan. Such a transaction, in spite of the opinion of Vattel, would now constitute as distinct a violation of neutrality as the sale of articles of war or the supply of troops. This seems to have been recognised by the United States as early as the close of the last century. During the war which prevailed at that time between Great Britain and France, two envoys were sent by the United States Government to the French Republic, in order to settle certain differences which had arisen between the two countries. In a despatch, dated March 23rd, 1798, the United States Government instructed its representatives that no treaty should be purchased with money, by loan, or otherwise, inasmuch as such a loan would violate the neutrality of the United States (*r*). The precise limits of neutral duty in regard to loans and contributions by the subjects of a neutral State to belligerents, and the attitude taken up by our own Municipal Law towards such transactions are not so clear. A brief consideration of this subject will be found in Excursus II. (below).

EXCURSUS II.—LOANS BY NEUTRAL SUBJECTS TO BELLIGERENT STATES.

I.

International Law does not prescribe the same strict limits to the subjects of a neutral State as it does to the State itself. The ever-increasing costliness of modern warfare and the necessity this imposes on belligerent States of contracting loans in other countries, renders it worth while to consider how far a subscription or contribution to such a loan is restricted by International or Municipal Law. There are practically three questions for consideration : (1) How far is there any obligation imposed on the neutral State of prohibiting such subscriptions on the part of its subjects? (2) how far will subscriptions, if at all, expose the subject to penal consequences in English law? and (3) how far will the English Courts deem such

transactions, and agreements arising out of them, illegal or non-actionable?

With regard to the first of these questions, it may be well to omit all reference to the opinions of the text writers, in view of the scanty deference paid to this source of law by English Judges. The usage of States, however, as indicated by official documents, and the opinions of official jurists given to their own Government, afford a more trustworthy species of authority. We find the views of the United States on the subject clearly stated in 1842 by Mr. Webster. Replying to a complaint made by Mexico in regard to a loan by the United States citizens to the Texan insurgents, he says: "As to advances and loans made by individuals to the Government of Texas, the Mexican Government hardly needs to be informed that there is nothing unlawful in this so long as Texas is at peace with the United States, and that these are things which no Government undertakes to prevent." In 1823 (probably on the occasion of a proposed loan in aid of Greek independence) the law officers of the English Crown gave an opinion on this subject to the following effect: (1) That subscriptions for the use of a belligerent by subjects of a neutral nation were inconsistent with neutrality and contrary to the Law of Nations, but that the other belligerent would not have a right to consider them as an act of hostility on the part of the Government, although they might afford just ground of complaint if carried to any considerable extent; (2) that loans for the same purpose, entered into merely with commercial views, would not be an infringement of neutrality, but if under colour of a loan a gratuitous contribution was afforded without interest, or at a merely nominal interest, such a transaction would be illegal.

In accordance with these principles it seems to be the common usage of nations to allow such loans to be raised in neutral countries. Hence we may conclude, that whilst a voluntary subscription, if carried to any considerable extent, would be an infraction of neutrality, and afford just ground of complaint to the other belligerent, a loan raised in a neutral country as a purely commercial transaction, on which interest was *bond fide* undertaken to be paid, would be perfectly legitimate.

Passing now to the question whether a subscription to any such loan might not involve penal consequences in English law, it seems that in 1823, on the occasion before referred to, the law officers of the Crown were asked for their opinion "as to whether, having regard to the Municipal Law of this country, there existed any, and what, means of proceeding against individuals and corporations engaged in such subscriptions." Apparently confining themselves to voluntary subscriptions, which they pronounced illegal by the Law of Nations, they reported that such subscriptions might subject the parties concerned in them to a prosecution for misdemeanour, on account of their

obvious tendency to interrupt the friendship subsisting between this country and the other belligerents, and to involve the State in dispute, and possibly in the calamities of war. They went on to say, however, that such subscriptions had formerly been entered into without any notice having been taken of them by public authority ; that there appeared to be no instance of a prosecution for such an offence ; and they did not think that, even if the money had been actually sent, such a prosecution would be successful. They further reported that, if money had not been actually sent, a prosecution for conspiring to assist with money either belligerent would be attended with still greater difficulty ; and, that, in any case, criminal proceedings would not lie against a corporation, but only against such of its individual members as were proved to have acted in the transaction.

In 1873 the question was again raised with respect to subscriptions raised in England on behalf of Don Carlos. On this occasion, Mr. Gladstone, in reply to questions put to him in Parliament, referred to the opinions given in 1823, and informed the House that, whenever information should be given to the Government from which there might appear any reasonable ground of expecting that an indictment for unlawful conspiracy to aid the invasion or disturbance of the peace of a foreign country at amity with us could be maintained, the Government would be prepared to vindicate the law of the country.

Thus the law on the subject appears to be still ambiguous and unsatisfactory. Mr. Gladstone, in 1873, deprecated any alteration of the law, in view of the fact that the Legislature had not long before been engaged in recasting the Foreign Enlistment Act, and that it was not desirable that changes on the subject should be made from day to day. He also referred to the risk of giving to cases of the kind a factitious importance.

But whilst it seems clear, in spite of some contrary opinion, that a purely commercial loan by neutral subjects to a recognized belligerent is quite warranted by the Law of Nations and by modern usage, a question has been raised in some English and American cases, as to the validity of certain classes of loans at municipal law. It may be well to premise that the borrower under such circumstances may occupy one of three different positions. The loan may be raised on behalf of an insurgent force whose belligerency is not recognized ; such was the position of the Cuban insurgents in the case of "*The Virginius*." It may be raised on behalf of insurgent colonies or revolted states, whose belligerency is, but whose independence is not, recognized by other nations ; such was the position of the Confederate States during the American Civil War. Or, lastly, the loan may be raised on behalf of one of two fully-recognized states, at war with each other, but in amity with us, such as France and China.

Passing to such authority as there is on the subject, we find a case of *De Wütz v. Hendricks* (9 Moo. C. B. 586), tried in 1834 before Chief Justice Best. In this case proceedings were instituted to recover a power of attorney and certain scrip receipts deposited with the defendant by the plaintiff in relation to a loan proposed to be raised on behalf of the Greeks against the Turkish Government. On the trial of the questions of law before the judges of the Common Pleas, Chief Justice Best referred with approval to an opinion which he expressed in the Court below, "That it was contrary to the Law of Nations for any person residing in this country to enter into engagements by way of loan for the purpose of supporting the subjects of a foreign State in arms against a Government in alliance with our own, and that no right of action could arise on such transactions." He referred also to a similar decision of the Lord Chancellor, in the case of a proposed loan to the subjects of the King of Spain, but, from a note to *De Wütz v. Hendricks*, it appears that the case referred to was not then reported. In the case of *Yrissari v. Clement* (11 Moo. C. B. 317) it was held that an action for libel would not lie for imputing to a party fraud in connection with an illegal transaction, the illegal transaction being the "raising of a loan for a State at war with one in amity with the Government of this country." Chief Justice Best assumed throughout that the transaction was undoubtedly illegal. It will be observed that, while in *De Wütz v. Hendricks* the illegality is stated to lie in raising a loan "for supporting the subjects of a foreign State in a war against a Government at peace with Great Britain," in *Yrissari v. Clement* it is extended to the case of a "loan to a State at war with one in amity with the Government of this country." This manifestly covers the case of a loan to one of two fully recognized States. Such a doctrine, if it could be sustained in its widest extent, would be fraught with the most dangerous consequences to the mercantile community. If a loan of a purely commercial nature to a belligerent State were illegal, all agreements arising out of it would be equally tainted, and a subscription to such a loan, even though procured by fraud or misrepresentation, would afford no right of action. In *Thompson v. Poules* (2 Simon, 194) it was held that, where the plaintiff had been induced by false representation of the defendant to purchase bonds issued by a colony which had revolted from Spain, he was still not entitled to relief, because the original transaction was void.

It would seem, however, that the doctrine of the illegality of such loans must be confined to those raised on behalf of insurgent forces or States, though it appears to include loans to insurgent States whose belligerency has been recognized. In the case of *Yrissari v. Clement*, already referred to, though the dictum of Chief Justice Best

is as stated above, yet the facts show that the question really at issue was the validity of a loan to an insurgent State.

In the American case, *Kennet v. Chambers* (14 Howard, 38) a contract was made in Cincinnati after Texas had declared itself independent, but before its independence had been recognized by the United States, under which money was to be furnished to a general in the Texan army to enable him to raise and equip troops to be employed against Mexico. The Court held that the contract was illegal and unenforceable. The Court expressly said: "It is not now necessary to decide how far a judicial tribunal of the United States would enforce a contract like this when two States acknowledged to be independent were at war and this country neutral," and went on to base its decision on the fact that Texas had not yet been recognized by the United States Government. Here, as in *De Wütz v. Hendricks*, it is clear that the illegality lay in the raising of a loan on behalf of a non-recognized State; but it is worthy of remark that the Court did not in any way intimate that a loan to a fully-recognized State would have been legal, but merely left the case out of its consideration.

Despite this fact, and one or two *obiter dicta* that may be found in other cases, it can scarcely be doubted that a purely commercial loan to a fully-recognized belligerent State is free from the taint of illegality. Such cases as *Seton v. Low* (1 Johnson, N. Y. Co. 1); *Ex parte Chavasse, re Grazebrook* (34 L. J. 17, Bank.); *The Helen* (L. Rep., 1 A. & E. 1), though they relate primarily to contracts as to blockade and contraband, yet disclose the broad principle that contracts as to transactions not involving any violation of neutrality, (even though attended with the risk of the confiscation of the property embarked,) are perfectly valid and enforceable in the English and American Courts. It is fair to conclude that, if a transaction is lawful by the Law of Nations, Municipal Courts will not pronounce it illegal without some express and direct authority. So far as loans to insurgent or not fully-recognized belligerent States go, there does appear to be such direct authority, but there seems to be no authority of this kind where the loan is a commercial loan to a fully-recognized belligerent State.

*NEUTRAL DUTIES (B).—ENGLISH AND AMERICAN
NEUTRALITY CASES.*

GIDEON HENFIELD.

Temp. 1793.

[WHARTON'S STATE TRIALS, 49.]

Case.] In May, 1793, during war between Great Britain and France, Gideon Henfield, a United States citizen, took service on board the "Citizen Genêt," a French privateer. The captain of the ship subsequently gave him the post of Prize Master on board the ship "William," which had been captured from the British by the "Citizen Genêt," and in this capacity he arrived at Philadelphia. He was thereupon indicted for a breach of the Neutrality Laws of the United States.

Judgment.] In his charge to the jury, Judge Wilson stated that the United States being neutral, acts of hostility committed by Henfield constituted an offence punishable by the laws of the country; as a citizen of the United States he was bound to act no part which could injure his own nation, and was bound to keep the peace in regard to all other nations with whom his own country was at peace. Such was the rule of conduct prescribed by the Law of Nations. Besides this, by the Constitution of the United States, all treaties made under the authority of the United States were part of the law of the land, and treaties of friendship existed with the Netherlands, Great Britain, and Prussia.

In spite of this ruling, however, the jury, after retiring several times, returned a verdict of not guilty.

Gideon Henfield, Wharton's State Trials, 49.

This case is of importance as leading to the United States Neutrality Act of 1794. This Act was the foundation of the modern Law of Neutrality. It forbade (1) the acceptance of a commission,

or enlistment in the army or navy of a foreign State ; (2) the fitting out of or issuing of commissions to cruisers, the augmentation of force of a war vessel, or the setting on foot of any military expedition for service against a friendly State. The President of the United States was authorized to use the land or naval forces to prevent the departure from the United States of vessels offending against the Act.

This Act remained in force till 1818, when it was replaced by another Neutrality Act. By this Act the following persons were declared liable to fine and imprisonment : (1) Citizens of the United States accepting commissions to serve a foreign Government at war with another Government, with whom the United States were at peace ; (2) Any person enlisting or procuring another to enlist in the service of a foreign State ; (3) Any person taking part in the fitting out or arming of vessels destined to cruise against a State with which the United States were at peace, or issuing a commission to any such vessels, such vessels to be forfeited ; (4) Citizens of the United States fitting out, arming, commanding, entering, or purchasing an interest in any vessel outside the United States, intended to commit hostilities against the citizens of another State or their property ; (5) Any person augmenting within the United States the force of any armed vessel belonging to a foreign Government at war with another foreign Government with which the United States were at peace ; (6) Any person setting on foot a military expedition against a State with which the United States were at peace. Power was given to the President of the United States to employ such part of the land or naval forces of the United States or the militia as should be necessary to compel any foreign ship to depart from the United States in all cases where by the Law of Nations or the treaties of the United States they ought not to remain there. Owners of armed vessels sailing from the United States were required to give a bond that the ship should not be employed to cruise against States at peace with the United States. Collectors of Customs were authorized to detain vessels built for warlike purposes about to depart from the United States, when circumstances rendered it probable that they were intended to cruise against States at peace with the United States, until the decision of the President on the matter should be given or a bond entered into.

THE UNITED STATES v. QUINCY.

Temp. 1832.

[6 PETERS, 445.]

Case.] The defendant in this case was charged in 1829 with having been concerned in the fitting out, in the port of Baltimore, of a vessel called the "Bolivar," with intent to employ her in the service of a foreign State, the United Provinces of Rio de la Plata, against the subjects and property of the Emperor of Brazil, with whom the United States were at peace. It was proved that the defendant had superintended the fitting out of the "Bolivar," and that her equipment was beyond that of a merchant vessel; also that she had left Baltimore with some warlike stores for St. Thomas, where she was ultimately fitted out as a privateer, and that she had then cruised under another name, and captured several vessels.

Judgment.] It was laid down by the Court, first, that if it were found that the defendant was concerned in fitting out the vessel with that intent he would be guilty, although the equipment was not complete when the vessel left the United States, and the cruise did not commence until men were recruited and further equipments made at St. Thomas; secondly, that, if when the vessel was equipped the owner intended her to go to the West Indies in search of funds wherewith to effect the armament, and had no present intention of employing her as a privateer, the defendant could not be found guilty; thirdly, that neither could he be found guilty if he had no fixed intention to use her as a privateer, but merely a wish to do so, the fulfilment whereof depended on future arrangements.

The United States v. Quincy, 6 Peters, 445.

This case is cited as containing a clear exposition of United States views as to the liability of subjects of a neutral State for illegal equipment. In an earlier case of the *United States v. Guinet* (reported 3 Dall. 321), it had been laid down that to aid in the conversion of a

merchant vessel into an armed vessel, with a view to enabling her to cruise against the commerce of a friendly nation, was an offence against the United States Neutrality Act of 1794.

The case of the *United States v. O'Sullivan and Lewis* (note to Wharton's Criminal Law, 5th edition, vol. II. pp. 519—525) contains an elaborate account of the nature of the evidence in such cases.

THE ATTORNEY-GENERAL v. SILLEM AND OTHERS.

Temp. 1863.

[2 HURLSTONE AND COLTMAN'S EXCHEQUER REPORTS, 431.]

Case.] In this case the defendants were charged under the Foreign Enlistment Act, 59 Geo. III. c. 69, on an information by the Attorney-General, with equipping a vessel called the "Alexandra," with a view to her employment in the service of the Confederate States against the United States, at the time of the American Civil War. The vessel was built at Liverpool for Messrs. Fraser, Trenholm, & Co., the agents of the Confederate States. After having been launched she was taken to Toxteth Dock for completion, and at the time of her seizure workmen were employed in fitting her with stanchions for hammock-nettings similar to those of a ship of war. The commander of one of Her Majesty's ships stated that she certainly was not intended for mercantile purposes, but that she might have been used as a yacht and was easily convertible into a man-of-war. On the trial of the case in the Court below, the judge had made liability depend on the presence of an *animus belligerendi*, and the defendants were acquitted. On motion for a new trial by the Attorney-General the case was argued at great length.

Judgment.] The Court at first were equally divided on the question as to whether there should be a new trial. The views of the Judges differed considerably as to the precise intent of the Foreign Enlistment Act. Pollock, C.B., and Bramwell, B., were of opinion that what was forbidden by the statute was such an equipment as would enable the ship

immediately on leaving port in this kingdom to cruise or commit hostilities. Channell, B., held that if the equipment was doubtful the defendants would still be liable if the ship was capable of being used for war, and there was an intent to that effect, even though at the time of her leaving she was not ready for immediate hostilities. Pigott, B., went further, and held that any act of equipment done with the prohibited intent was within the statute, but the Baron afterwards withdrew his judgment, and under these circumstances the rule for a new trial was discharged.

[Thus the principle so far deducible from the case would seem to be that the building in pursuance of a contract, with intention to sell and deliver to a belligerent power, of the hull of a ship suitable for war, but not equipped or fitted with anything enabling her to cruise or commit hostilities, was not a violation of the Foreign Enlistment Act of 1819.]

The Crown appealed to the Exchequer Chamber, but the appeal was disallowed on a technical ground, and the question never got beyond the stage mentioned above.

The Attorney-General v. Sillem and Others, 2 Hurlst. & Colt. Exch. Repts. 431.

With regard to British neutrality legislation, the earlier statutes against foreign enlistment do not seem to have been framed with any view to the observance of neutral duties. Thus, 3 Jac. I. c. 4, and 1 W. & M. c. 8, make it felony to enter the service of another State; 9 Geo. II. c. 30, makes enlisting, or procuring his Majesty's subjects to enlist in foreign service, felony punishable with death, without benefit of clergy; 29 Geo. II. c. 17, amending the previous statute, inflicts a similar punishment on British subjects who contract or engage to enlist in foreign service, and on persons engaging them, without licence from his Majesty, subject to certain reservations in favour of the service of the States General. The object of these statutes seems to have been to guard against the recruitment of the forces of foreign States, and especially of the Jacobite pretenders, from amongst the disaffected subjects of the English Crown. The first real neutrality law was the Foreign Enlistment Act of 1819, which was passed in consequence of

the part taken by British subjects in the war then prevailing between Spain and her American colonies. This Act (59 Geo. III. c. 5), after repealing previous statutes, makes it a misdemeanour punishable with fine and imprisonment or either, at the discretion of the Court, for a subject to enlist or engage to enlist in foreign service, naval or military, or to accept a commission, or to engage to go into a foreign country with intent to enlist, or to procure others to enlist. Vessels engaged in carrying illegally enlisted persons are made liable to arrest and detention by the local authorities, and a penalty is inflicted on any master who takes such persons on board. By the seventh and most important section, it is made a misdemeanour, punishable with fine and imprisonment or either, at the discretion of the Court, to fit out armed vessels, without the license of the Crown, for employment against a friendly State, or to deliver commissions to ships for such purpose. or to augment the force of a foreign war vessel.

As to the effect of this provision relating to equipment, Sir Wm. Vernon Harcourt, in his letter on the Foreign Enlistment Act (*r*), expressed an opinion that the Act did not in any way control the freedom of neutral commerce, that it was directed not against the *animus vendendi*, but the *animus belligerendi*. In support of this view he referred to a speech of Mr. Huskisson in 1830, to the effect that the Act could not forbid the equipping and arming of a ship for sale, without at the same time forbidding the making and selling of arms.

The divergence of opinion which existed amongst the judges in the case of the *Attorney-General v. Sillem* affords some illustration of the difficulty of interpreting this section. The subject, however, is now regulated by the provisions of the Foreign Enlistment Act, 1870, 33 & 34 Vict. c. 90 (*s*).

THE "SALVADOR."

Temp. 1870.

[L. R. 3 P. C. 218.]

Case.] This vessel was seized under a warrant from the Governor of the Bahama Islands, and proceeded against in the Vice-Admiralty Court of those islands for breach of the

(*r*) *Historicus Letters on International Law*, p. 171.

(*s*) See p. 180, *infra*.

7th section of the Foreign Enlistment Act, 59 Geo. III. c. 69. The breach alleged was that the "Salvador" had been equipped for the purpose of aiding the Cuban insurgents.

Judgment.] The lower Court decided that the vessel was not liable on the ground that the Cuban insurgents did not come within the terms of the statute. This decision, however, was overruled by the Judicial Committee of the Privy Council, on the ground that there was an insurrection in Cuba, that the insurgents, who had formed themselves into a body, formed part of the province or people of Cuba, undertaking and conducting hostilities, and that the vessel was to be employed in the service of the insurgents.

The Salvador, L. R. 3 P. C. 218.

This case is cited as illustrating the applicability of foreign enlistment provisions to cases of vessels fitted out in aid of insurgents (*ss*).

THE "GAUNTLET."

Temp. 1870.

[L. R. 4 P. C. 184.]

Case.] During the Franco-Prussian War of 1870, a Prussian merchant vessel was captured in the Channel by a French man-of-war, and a prize crew under the command of a French naval officer was put on board. The prize was driven by stress of weather into the Downs, and anchored within British waters. After it had been there two days, the French Consul at Dover engaged an English tug to tow the vessel to the Dunkirk Roads. Proceedings were subsequently taken against the owners of the tug for condemnation under the 8th section of the Foreign Enlistment Act, 1870, which enacts

(*ss*) For an account of other Cuban national Law (English edition by expeditions, fitted out in United Boyd), pp. 516, 517. States territory, see Wheaton's Inter-

that if any person despatches any ship with intent that she shall be employed in the service of a foreign State at war with a friendly State, the ship and her equipment shall be forfeited.

Judgment.] It was held by the Judicial Committee of the Privy Council, reversing the decree of the Court of Admiralty, that the engagement by the owners of the tug to tow the detached prize with her prisoners and crew to French waters, where they would be taken charge of by the French authorities, was despatching a ship within the meaning of the section, and the tug was condemned as a forfeiture to the Crown.

The Gauntlet, L. R. 4 P. C. 184.

The decision of the Court of Admiralty in the case of the "Gauntlet," which was overruled by the Judicial Committee, was followed by another decision in the case of the "International" (L. R. 3 A. & E. 321), which does not appear to have been appealed from. In that case, during the Franco-Prussian War, an English company entered into a contract with the French Government for the laying down of certain submarine telegraph cables between different points on the coast of France. It appeared that, by means of short telegraph lines carried over land, the series of cables could be united into one line stretching from Dunkirk to Verdun. The undertaking was of a commercial nature, the object being to furnish postal telegraphy, and the contractors were in no way parties to any project for adapting the line to military purposes. The company shipped the cables on board the "International," a steamship belonging to them, but before the latter could quit port, she was detained by the British authorities, on the ground that she was about to be despatched contrary to the provisions of the Foreign Enlistment Act. On the application of the owners, it was held that they were entitled to have the ship released, in spite of the fact that the line when complete might be partially used for military purposes. The Court held that this probability was not sufficient to divest the line of its primary commercial character, or to clothe the service to be rendered by the ship with a military or naval character within the meaning of the Act. Inasmuch, however, as the Court was of opinion that there was a reasonable and probable cause for the detention, no order was made as to costs or damages.

Passing to the general subject of the Foreign Enlistment Act of

1870, under which these cases were decided, this statute seems to have owed its introduction to the disputes which arose between Great Britain and the United States as to the "Alabama" and her sister cruisers. The correspondence which ensued with the United States on this subject, had the effect of calling the attention of the English Government to the defects of the Foreign Enlistment Act of 1819. A special commission was appointed to enquire into and report upon the Act. In consequence of the recommendations of this commission, the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), repealing that of 1819, was passed. By this Act it is made an offence punishable by fine and imprisonment, with or without hard labour: (1.) For any person within British jurisdiction, or for a British subject anywhere, to enlist without her Majesty's license in the service of any foreign State at war with a friendly State, or to induce any other person to do so; (2.) To leave, or go on board any ship with the view of leaving, her Majesty's dominions in order to enlist in such service, or to embark persons under false representations, in order to induce such persons to enlist in such service; (3.) For any master or owner of any ship to take illegally enlisted persons on board, the ship in this case being also detainable.

A similar penalty, in addition to the forfeiture of the ship and her equipment, is also imposed on the following acts: (1.) Building, equipping, or despatching a ship with reasonable cause for belief that it will be employed in the service of a foreign State at war with a friendly one; (2.) Issuing a commission to any ship to be employed for this purpose; (3.) Aiding the warlike equipment of a ship with like intent; or (4.) Aiding in the fitting out of any military expedition. These penalties, however, are not to apply to any person building or equipping a ship in pursuance of a contract made before war; provided that, upon the proclamation of neutrality he gives notice to the Secretary of State, furnishes him with the required particulars, and gives security against the removal of the ship before the termination of the war. Prizes captured in violation of British neutrality and brought into British ports are to be restored.

The Secretary of State or Chief Executive Authority can, if satisfied that a ship has been built, commissioned, or equipped contrary to the Act, or is about to be despatched contrary to the Act, issue a warrant stating that there is reasonable cause for his belief, and upon such warrant the local authorities can seize and detain the ship. Local authorities are empowered to detain ships upon representations to the same effect, believed by them; the arrest or detention being reported to the Secretary of State or Chief Executive Authority, and no responsibility being incurred if this is done. The Secretary of State or Executive Authority can also grant a search warrant to search any dockyard in cases of suspicion.

Here our municipal legislation on the subject of Foreign Enlistment ends. It is only necessary to add that the provisions of Municipal Law on this subject cannot be regarded in any way as the measure of neutral obligation at International Law. Whilst, on the one hand, the fact of a Neutral State failing to make any municipal provision on the subject would not exempt it from liability for breach of any International obligation, the fact of its making such provision cannot be allowed to increase the liability.

With regard to the obligation of the Neutral State under the Law of Nations, as distinguished from the question of the liability of the individual at Municipal Law, it seems to have been thought, before the case of the "*Alabama*," that no liability would arise in connection with the construction and outfit of war vessels, unless they left neutral territory with commission, armament, and sufficient crew, ready in fact to commence immediate hostilities. The decision of the Geneva Tribunal and the Treaty of Washington have certainly altered this view so far as Great Britain and the United States are concerned; but the exact limits of the obligation still seem doubtful as between other nations. It is suggested by Mr. Hall (*t*) that the test really lies in the character of the ship herself, that vessels built primarily for warlike use ought to be detained, whilst vessels built primarily for commercial purposes ought to be allowed to depart.

EXCURSUS III.—NEUTRALITY REGULATIONS OF FOREIGN STATES.

The following appear to be the neutrality regulations of some of the principal maritime Powers :—

BELGIUM (*tt*).

By general provisions, penalties are imposed on any person who shall expose the State to war, or subject any Belgian subject to reprisals. Belligerent vessels are also prohibited from remaining in

(*t*) International Law, 2nd edition, pp. 566—568.

(*tt*) These and other neutrality regulations have been selected from the

Appendix to the Report of the Neutrality Laws Commissioners, dated 1868.

182 *Cases and Opinions on International Law.*

Belgian ports for more than twenty-four hours, unless detained by stress of weather.

DENMARK.

Privateers are forbidden to enter Danish ports, except on account of stress of weather or pursuit by an enemy. Foreign vessels of war and privateers are forbidden to send their prizes to, or sell them in Danish ports, and Danish subjects are forbidden to purchase prizes brought in. Special rules are laid down for the navigation of ships during the existence of hostilities.

FRANCE.

Penalties are imposed upon any person who by hostile acts shall expose the State to war, or any French subject to reprisals.

ITALY.

The Italian naval code contains provisions to the following effect:—
(1.) In case of war between foreign powers, privateers, or war vessels, with prizes, are not to be received, except in case of stress of weather ;
(2.) No war ship or privateer shall remain in an Italian port beyond twenty-four hours, except in case of stress of weather, shipwreck, or absence of means for navigation ; (3.) Prizes are not to be sold or exchanged in Italian ports ; (4.) Ships of friendly powers can, although belligerent, remain in Italian ports when their objects are exclusively scientific ; (5.) Belligerent ships are not to obtain arms or ammunition in Italian ports, or augment their force under pretence of repairs ; (6.) Food, commodities, and means of repair, necessary for the sustenance of the crew and safety of navigation, can alone be supplied to war ships or belligerent privateers ; (7.) Coals are not to be furnished until twenty-four hours after arrival in the case of belligerent war ships and privateers ; (8.) Where war vessels of two belligerent nations are together in an Italian port, twenty-four hours are to elapse between the departures ; this interval can be increased according to circumstances ; (9.) Acts of hostility within the territorial waters of the State constitute a violation of its neutrality.

HOLLAND.

It appears that, in 1868, there were no special laws applicable to this subject ; but that the Government was authorized in some cases to make use of Articles 84 and 85 of the Penal Code, in order to prevent violation of neutrality. The subject would probably be dealt with by special rules made on the outbreak of war.

PRUSSIA.

Hostile acts committed by a Prussian anywhere, or by a foreigner in Prussia, against a foreign State or its ruler, are punishable if the same acts committed against the King of Prussia would be high treason. Whoever enlists or causes the enlistment of a Prussian in a foreign military service, or attempts so to do, is punishable with imprisonment.

By the Prussian Penal Code, the following acts are also made penal :—(1.) Assembling or commanding armed bodies of men without authority, or furnishing with arms or the necessities of war, a body of men known to be assembled without the permission of the law ; (2.) Taking part in such armed meeting ; (3.) Secretly, or in defiance of the authorities, storing up arms or ammunition by anyone not in the trade. In these cases a confiscation of the stores also takes place. These provisions, though of general application, would, it seems, meet the case of a belligerent making use of Prussian territory as a base of operations, or for the purpose of fitting out a hostile expedition against another belligerent.

RUSSIA.

By Article 259 of the Russian Penal Code, any Russian subject who, in time of peace, openly attacks a foreign country, and thereby subjects his own country to the danger of war, is rendered liable to punishment.

Besides the regulations above referred to, many States appear from time to time to have made regulations applicable to particular wars.

*NEUTRAL DUTIES (C).***CASE OF M. GENÉT.***Temp. 1793.*

[AMERICAN STATE PAPERS, VOL. I.]

Case.] Soon after the outbreak of war between France and Great Britain in 1793, the President of the United States issued a proclamation of neutrality which, amongst other things, prohibited United States citizens from aiding and abetting the hostilities which were proceeding between the belligerents.

In spite of this M. Genêt, the French Minister accredited to the United States, on arriving at Charleston, issued commissions to certain United States citizens. The latter, in virtue of the commissions, proceeded to fit out privateers, the crews of which were almost wholly recruited from United States citizens, and to commit depredations on British commerce.

The English Minister thereupon remonstrated with the United States authorities, contending that these proceedings of M. Genêt constituted at once a violation of the United States neutrality and an insult to their sovereignty. He also demanded restitution of the vessels captured by the privateers sailing under M. Genêt's commission, that had been brought into United States ports. Mr. Jefferson, in a communication addressed to the United States Minister at Paris, a copy of which was sent to M. Genêt, intimated that it was the right of every nation to prohibit acts of sovereignty from being exercised within its limits by another nation, and the duty of a neutral to prohibit such as would injure either of the belligerents. He also laid down that the granting of military commissions within the United States by any other authority was an infringement of their sovereignty, especially when granted to United States citizens with a view to induce them to do acts contrary to the duties they owed their country. On the question of restitution there was some difference of opinion between the members of the United States executive. Ultimately measures were taken by order of the President of the United States for restoration of the prizes, and remonstrance was thereupon made by M. Genêt, suggesting that the 22nd Article of the Treaty of Commerce between the United States and France expressly authorized French ships to arm in the United States ports whilst forbidding this to the ships of any other nation. The United States, however, did not admit this interpretation of the treaty and the recall of M. Genêt was subsequently demanded.

Case of M. Genêt, American State Papers, Vol. I.

THE TERCEIRA AFFAIR.*Temp.* 1830.

[HANSARD'S PARLIAMENTARY DEBATES, N. S., VOL. XXIII., p. 737.]

Case.] In 1827, Don Pedro, King of Portugal, renounced the throne in favour of his daughter Donna Maria, and appointed his brother, Don Miguel, regent, retaining to himself the Empire of the Brazils. Shortly afterwards Don Miguel usurped the throne of Portugal, and the country was thrown into a state of civil war.

Don Pedro's ministers called upon the European Powers to interfere and drive the usurper from the throne, the application being more especially addressed to Great Britain on account of the treaties subsisting between the countries. Great Britain, however, refused to interfere, the treaties referred to merely providing that Great Britain should furnish Portugal with auxiliaries in the event of a foreign invasion. Meanwhile a number of Portuguese refugees having arrived in England took up their residence in Portsmouth and the vicinity.

The British Government, suspecting that these persons were endeavouring to fit out an expedition against Don Miguel, with the cognizance of the Brazilian Government, gave notice to the Brazilian Ambassador that such an expedition could not be allowed to be fitted out here. The ambassador stated in reply that the ships, which were being fitted out, were destined for Brazil. In consequence of this assurance, 4 ships with 652 hands on board, under the command of General Count Saldanha, were allowed to depart. The Government nevertheless suspected that the true destination of the expedition was Terceira, one of the Azores Islands. They consequently despatched Captain Walpole with a small squadron to Terceira, with instructions to prevent the Portuguese expedition from disembarking. These instructions were duly carried out, and the Portuguese expedition was sent back.

The action of the English Government in the matter was

approved by a majority in Parliament; but according to Sir Robert Phillimore, the true principles of International Law on the subject are set forth in a protest made in the House of Lords and a resolution moved in the House of Commons.

Protest in Lords.] The protest in the House of Lords reprobated the action of the Government, "Because the forcible detention or interruption of the subjects of a belligerent State, upon the high seas, or within the legitimate jurisdiction of either of the belligerents, by a neutral, constitutes a direct breach of neutrality, and is an obvious violation of the Law of Nations. And such an act of aggression, illegal and unjust at all times against a people with whom the interfering Power is not actually at war, assumed in this instance a yet more odious and ungenerous aspect, inasmuch as it was exercised against the unarmed subjects of a defenceless and friendly sovereign, whose elevation and right to the Crown of Portugal had been earnestly recommended and openly recognised by his Majesty, and whose actual residence in Great Britain, bespeaking confidence in the friendship and protection of the King, entitled both her and her subjects to especial favour and countenance, even if considerations of policy precluded his Majesty's Government from enforcing her just pretensions by arms."

Resolution moved in Commons.] In the resolutions moved in the House of Commons it was suggested, "That the use of force in intercepting these unarmed vessels, and preventing them from anchoring and landing their passengers in the harbour of Porto Praira, was a violation of the Sovereignty of the State to which the island of Terceira belonged; and that the further interference to compel those merchant ships or transports to quit the neighbourhood of the Azores was an assumption of jurisdiction upon the high seas, neither justified by the necessity of the case, nor sanctioned by the general Law of Nations."

The Terceira Affair, Hansard's Parliamentary Debates, N. S., Vol. XXIII., p. 737.

THE "SANTISSIMA TRINIDAD."*Temp. 1822.*

[7 WHEATON, 283.]

Case.] During the Civil War, which broke out in 1817 between Spain and her South American Colonies, two Spanish vessels, the "Santissima Trinidad" and the "St. Ander," were captured by two vessels, the "Independencia del Sud" and the "Altravida," which had been commissioned by the United Provinces of the Rio de la Plata. Part of the cargoes having been brought within United States territory, proceedings for restitution were taken by the Spanish Consul, on the ground that these vessels had been originally fitted out in violation of United States neutrality, and also that there had been a subsequent illegal augmentation of force within United States territory.

Arguments and Judgment.] The first question that arose was whether the "Independencia del Sud" was a public ship. It having been proved that the commander of the ship, Captain Chaytor, held a commission from the Government of Buenos Ayres, the Court thought that this afforded satisfactory evidence of her public character. It having been urged that Buenos Ayres had not been recognised by the United States as an independent State, the Court stated that the United States Government had recognised the existence of civil war between Spain and her colonies, and each party must be deemed a belligerent nation having the sovereign rights of war and entitled to be respected in the exercise of those rights.

The next question was whether the prizes had been captured in violation of the neutrality of the United States, by reason of an original unlawful construction and outfit of the capturing vessels in United States territory. As to this it appeared that the "Independencia del Sud" had been loaded with munitions of war and sent to Buenos Ayres as a commercial adventure, the supercargo being authorized to sell the vessel to the Buenos Ayres Government, if a suitable price could be obtained. This was ultimately done, and the vessel was then commissioned by

the Buenos Ayres Government. As to this the Court held that there was nothing in the Law of Nations that forbade sending armed vessels as well as munitions of war to foreign ports for sale; it was a commercial adventure, which only exposed the persons engaged in it to the penalty of confiscation in the event of capture by the other belligerent. There was, therefore, no pretence for suggesting that the original outfit for the voyage was illegal, or that a capture made after the sale was, for that cause alone, invalid.

A further question was raised as to the augmentation of the force of the vessel within United States territory. As to this it appeared that after the sale at Buenos Ayres the vessel had put into Baltimore, where she was received as a public ship, and that a considerable number of persons had enlisted on board her. On this point the Court held, that in default of proof to the contrary, such persons must be presumed not to have been subjects of Buenos Ayres; that such an illegal augmentation of force was a violation of the Law of Nations as well as of the United States Neutrality Laws; and that it infected and invalidated all captures made during that cruise, but not captures made before or afterwards. The Court therefore affirmed the decree of restitution which had been made by the District Court.

In reply to various other objections urged by counsel for the captors, the Court laid down:—(1.) That though a public vessel was herself exempted from proceedings *in rem* for captures effected in violation of United States neutrality, yet in respect of United States jurisdiction over the prizes themselves if brought within United States territory, there was no distinction between those of a public vessel and those of a privateer. (2.) That a public vessel could not communicate her privilege of exemption to her prizes so as to preclude the legality of their capture being inquired into. (3.) That a decree of condemnation by the Buenos Ayres Court, after proceedings had been commenced in the United States Courts, could not oust the jurisdiction or defeat the judgment of the latter;

the possession and title of the captors being divested by the seizure of the property and the proceedings in the neutral tribunal.

The Santissima Trinidad, 7 Wheaton, 283.

Amongst the important principles laid down in this case, it may be worth while to recall the following:—(1.) The commission of the captain of a public vessel is *prima facie* evidence of her public character; (2.) The recognition of the belligerency of a revolted province gives its Government a right to issue commissions, and to exercise other belligerent rights; (3.) According to the view then taken by the United States court, the mere sale by a neutral individual of a war ship to a belligerent Government was not a breach of neutrality, but a mere export of contraband, which subjected the property whilst on its way to the risk of capture and confiscation by the other belligerent (u); (4.) Outfit and augmentation of force in neutral territory vitiate all captures made during the succeeding voyage; (5.) If violation of neutrality has taken place, all prizes brought within neutral ports are subject to neutral jurisdiction, and restitution; (6.) The fact of a decision having been given in the case by the belligerent Prize Court does not preclude neutral jurisdiction.

With regard to violation of neutral territory by augmentation of force, it should be noted that mere replacement of force will not be considered as having this character. In the case of *Moody v. The Phoebe Anne* (3 Dall. 319), it appeared that, in the course of the cruise in which the capture had taken place, the captor, a French privateer, had entered Charleston to repair, and that whilst the repairs were being effected her mast, sails, and armament had been removed, but subsequently replaced without any material addition. It was held under these circumstances that no decree for restitution could be made.

(u) This principle, however, needs considerable qualifications since the "Alabama" controversy, so far, at least, as Great Britain and the United States are concerned.

LA AMISTAD DE RUES.*Temp.* 1820.

[5 WHEATON, 385.]

Case.] A Spanish ship had been captured by the Venezuelan privateer "La Guerriere," but was subsequently taken possession of by a detachment from the United States ketch "Surprise," and brought into New Orleans for adjudication. A claim was made by the original Spanish owners for restitution, on the ground of an illegal augmentation of the crew of the privateer having taken place within the United States. The Court below decreed restitution to the original Spanish owners with damages, and the Venezuelan captors appealed against the decree.

Judgment.] Story, J., after reviewing the evidence as to the illegal augmentation, came to the conclusion that it was not free from reasonable doubt. In cases where the aid of a neutral Court was sought against a belligerent capture, the burden of proof rested on the party seeking such aid; to justify restitution, the violation of neutrality should be clearly made out. The present case not being free from reasonable doubt, the decree of restitution to the original owners, made by the Court below, was overruled.

With regard to the claim of the original owners for loss of market, the learned Judge held that such claim would have been inadmissible, even if restitution to the original owners had been decreed. In the case of marine torts it had been held that the probable profits could not be taken into account. The doctrine of the Court was that whenever a capture was made in violation of neutrality, if the prize came within the jurisdiction it should be restored to the original owners, subject to the violation of neutrality being clearly established. But the Court had never carried its jurisdiction farther than decreeing restitution and costs of suit, and it now disclaimed all right to inflict damages for plunderage. Neutral nations might inflict penalties for viola-

tion of neutrality, but they did so in vindication of their own rights, and not by way of compensation to the injured belligerent.

La Amistad de Rues, 5 Wheaton, 385.

This case is cited as illustrating the legal aspect of neutral jurisdiction when there has been a violation of neutral territory by either belligerent. Such jurisdiction is not exercised for the purpose of compensating the injured belligerent; but in pursuance of what is at once a neutral right and a neutral duty, viz., the preservation of its own territory from violation by either belligerent.

THE "ALABAMA."

Temp. 1872.

[PAPERS RELATING TO THE TREATY OF WASHINGTON, VOLS. I. TO IV.,
PUBLISHED AT WASHINGTON, 1872—1873.]

Case.] The "Alabama" was built at Liverpool by Messrs. Laird & Co., and launched in May, 1862, during the American Civil War. She was known originally as No. 290, but was evidently intended as a vessel of war. The United States Minister in London wrote on the 23rd of June to Lord Russell, pointing out that the vessel was about to leave, with the view of entering the service of the Confederate States. On the 30th, the law officers advised that if sufficient evidence could be obtained to justify proceedings under the Foreign Enlistment Act, they should be taken as early as possible. Up to the 15th of July the commissioners advised that there was not sufficient evidence. Sir Robert Collier, however, advised on the 16th that there was. The opinion of the law officers of the Crown was again asked, and they then advised the detention of the vessel; their opinion was not, however, made known until the 31st of July, and on the 29th the "Alabama" had sailed unarmed from Liverpool. She proceeded to the Azores, where

(x) This of course refers to the date of the award and not to the date of the occurrence.

she was fully equipped as a vessel of war, her armament and ammunition, together with a large number of recruits, having been brought out to her by the "Agrippina" and the "Bahama," both of which vessels cleared from British ports. She was then commissioned as a Confederate cruiser, and soon afterwards destroyed the United States ship of war "Hatteras." She then put into Jamaica, where she arrived on the 20th of January, 1863. At that time she was a commissioned ship of war, and as such, in the opinion of the British authorities, protected from seizure. Some repairs were done to her, and she left port on the 25th. On a subsequent occasion, the "Alabama" having put into Saldanha Bay, in Cape Colony, for repairs, the United States Consul wrote to the Governor of the colony, protesting against the ship being allowed to remain in any of the ports of the colony; the Governor wrote in reply that the vessel would leave port as soon as the repairs were completed. The law officers of the Crown, when subsequently called upon for their opinion as to what had taken place at the Cape, advised that no authority at the Cape could exercise any jurisdiction over the ship, and that, whatever her previous history, they were bound to treat her as a ship of war belonging to a belligerent power. Permission was given Captain Semmes at the Cape to land his prisoners. On subsequent occasions the "Alabama" put into various British ports, and was allowed to take coal and effect repairs without molestation. On the 11th of June, 1864, she entered Cherbourg, where she was challenged by the United States war steamer "Kearsage;" an encounter between the two vessels took place on the 19th, and in the result the "Alabama" was destroyed. A claim was made by the United States Government on account of the "Alabama's" depredations, mainly on the following grounds: (1.) That she was constructed, fitted out, and equipped within the jurisdiction of Great Britain, with intent to cruise against the United States, Great Britain having had reasonable ground to believe that such was the intent, and not having used due diligence to

prevent what was being done ; (2.) That as she was constructed and armed within British jurisdiction, and as the construction and despatch of the vessel and arms had taken place at a British port, and the British authorities had ample notice of the fact, the whole must be regarded as a hostile expedition from a British port against the United States ; (3.) That Great Britain did not use due diligence to prevent the departure of the vessel from Liverpool, or subsequently from Kingston, Singapore, or the Cape ; (4.) That no orders for her detention were sent out ; (5.) That she received excessive hospitality at Cape Town, being allowed to coal before three months had expired from her coaling at Singapore.

It was also contended that the responsibility for the ship included responsibility for the acts of her tender, the " Tuscaloosa " (*yy*).

The Alabama, Papers relating to Treaty of Washington, Vols. I. to IV. (Publ. at Washington, 1872, 1873) (*x*).

THE "FLORIDA."

Temp. 1872.

[PAPERS RELATING TO THE TREATY OF WASHINGTON, PUBLISHED AT WASHINGTON, 1872—1873.]

Case.] The "Florida" was also built at Liverpool during the American Civil War. She was known by the name of the "Oreto," and it was stated that she was being built for the Italian Government. Representations as to her real destination were made to the British authorities by the American Consul at Liverpool ; but as these were deemed to be unaccompanied by sufficient evidence the vessel was not molested, and ultimately cleared for Palermo and Jamaica. She was seized at the Bahamas, and proceedings for her con-

(*yy*) As to the "Tuscaloosa," see p. 196, *infra*.

(*x*) The decision of the Geneva Tribunal as to this and the other

vessels in respect to which claims were made by the United States, will be found in the *Excursus* on the Geneva award.

demnation were taken, but she was discharged on the ground that she had shipped no munitions of war in the colony, and that there was no evidence of her having been transferred to a belligerent. She then proceeded to Green Cay, where she was equipped as a war vessel. Her armaments had meanwhile been prepared at Liverpool, conveyed by train to Hartlepool, and thence brought out to her by the "Prince Alfred." She also enlisted some men at Nassau, and endeavoured, without success, to enlist others at Cuba. She next went to Mobile, having succeeded in eluding the blockading squadron; she remained there upwards of four months, and then issued forth as a Confederate ship of war, in which character she committed extensive depredations on Federal commerce. During all this time the "Florida" was admitted to British ports and treated as a belligerent cruiser. She continued her career until she was seized by the United States ship "Wachusett," at Bahia, in October, 1864.

After the war claims were made by the Government of the United States against Great Britain, in respect of the "Florida." The grounds of complaint urged were: (1.) That when she left Liverpool she was intended to cruise and carry on war against the United States; (2.) That she was fitted out and equipped within British jurisdiction; (3.) That Great Britain had reasonable ground to believe that the fitting out and equipment had taken place within British jurisdiction; (4.) That she had there been specially adapted to warlike uses; (5.) That Great Britain had possessed both the right and the power of preventing her departure, but had failed to do so.

It was also urged that both the "Florida" and other vessels ought to have been seized on entering British ports. To this argument three answers were given, 1st. That the Government had not the right to seize them, seeing that when they came again into British ports they were admitted as the commissioned ships of war of a belligerent State; 2ndly. That the Government could not as a neutral Government seize a belligerent ship of war for what was a violation, not of

neutrality, but only of its own municipal law ; 3rdly. That even if it had the right it was under no obligation to exercise it.

The Florida, Papers relating to Treaty of Washington, Vols. I. to IV. (Publ. at Washington, 1872, 1873).

**THE "SHENANDOAH," "NASHVILLE," "SUMTER,"
AND "GEORGIA."**

Temp. 1872.

[PAPERS RELATING TO THE TREATY OF WASHINGTON, VOLS. I. TO IV.,
PUBLISHED AT WASHINGTON, 1872—1873.]

Case.] The "Shenandoah" was originally a British merchant vessel known as the "Sea King." During the American civil war she was purchased by the Confederate authorities, and cleared for Bombay. Troops were brought out to her by the "Laurel," and she was transformed into a Confederate cruiser off the island of Madeira, and preyed on the Federal commerce in the southern seas. On the occasion of her putting into Melbourne to repair, the United States Consul made remonstrances to the Governor of the Colony. Notwithstanding these the "Shenandoah" was allowed to repair, to take in supplies and coals, and also to enlist recruits during her stay at Melbourne. Subsequently to her departure she captured several United States vessels.

The grounds of the claim made by the United States against Great Britain in respect to the "Shenandoah" were : (1.) That she was fitted out and armed in London for the purpose of cruising against the United States, Great Britain having had reasonable ground to believe that such was the case, and not having used due diligence to prevent it ; (2.) That on her coming again within British jurisdiction, when all the facts were notorious, the British authorities exercised no diligence to prevent her departure, but claimed the right to treat her as a commissioned vessel of war, and to permit her to depart as such ; (3.) That she twice received within

the British jurisdiction large recruitments without due diligence being used to prevent this ; (4.) That she was allowed to effect repairs, and receive coals and supplies, and in fact to make British territory the base of her operations.

Claims were also made in respect to the "Nashville," the "Sumter," and the "Georgia." The general grounds of claim were their reception in British ports and the supplies of coal furnished to them. In respect of the "Georgia," which was a British built ship, it was also contended that effective measures to prevent her equipment and her departure from Great Britain had not been taken.

The Shenandoah, Nashville, Sumter, and Georgia,
Papers relating to Treaty of Washington,
Vols. I. to IV. (Publ. at Washington, 1872 and
1873).

THE "TUSCALOOSA."

Temp. 1872.

[PAPERS RELATING TO THE TREATY OF WASHINGTON, VOLS. I. TO IV.,
PUBLISHED AT WASHINGTON, 1872—1873.]

Case.] In 1863, during the American Civil War, a United States merchant vessel, known originally as the "Conrad," was captured by the "Alabama." Captain Semmes, of the "Alabama," changed the name of the prize to the "Tuscaloosa," and put an officer and crew of ten men on board, together with two small guns ; he then brought her to the Cape of Good Hope, and requested her admission as a tender to his vessel. At the instance of the United States Consul the question was raised whether the vessel, not having been regularly condemned, ought not to be regarded merely as a prize and consequently as inadmissible into neutral territory. The Attorney-General of the colony advised that if the "Tuscaloosa" had received her armament from a duly commissioned Confederate vessel, and was commanded by a person holding

a commission, she was entitled to be treated as a public vessel. She left the Bay in August and returned in December. Meantime the opinion of the law officers of the Crown in England had been taken. Their opinion differed from that of the Attorney-General of the Cape, in so far as they considered that the vessel did not cease to have the character of a prize, because she was, at the time of being brought within British waters, armed with two small guns, in charge of an officer, and manned with a crew of ten men from the "Alabama," and in fact used as a tender to that vessel. They were also of opinion that the allegations of the United States Consul should have been communicated to Captain Semmes while the "Tuscaloosa" was in British waters; that he should have been requested to state whether he admitted them, and that on his refusal to do so he should have been called upon to produce the ship's papers; if the ship appeared to have been an uncondemned prize, it was suggested as a matter deserving consideration, whether the exercise of any further control over her by the captors should not have been prohibited, and the vessel kept under British control until reclaimed by the original owner.

Subsequently the "Tuscaloosa" returned to the Cape, and was seized by the Colonial authorities. Thereupon protest was made by her commander, on the ground that she had been previously treated as a war vessel. The law officers were again consulted and advised that the seizure could not be justified in view of her previous recognition as a war vessel. Orders were consequently given to restore the "Tuscaloosa" to her late commander, or if he should have left the Cape to retain her until she could be handed over to some person authorized by Captain Semmes or the Confederate States to receive her. The ship was not given up, but remained in the custody of the local authorities till the end of the war, when she was delivered up to the United States. After the war the United States made the treatment of the "Tuscaloosa" a subject of claim against the British Government. The United States also contended that the responsibility of the British Govern-

ment for the acts of the "Alabama" included liability for acts of her prizes.

The Tuscaloosa, Papers relating to the Treaty of Washington, Vols. I. to IV. (Published at Washington, 1872 and 1873).

It was subsequently held by the Geneva tribunal that Great Britain was liable for the damage sustained by the United States on the part of the "Tuscaloosa," and other tenders to the "Alabama." The case therefore illustrates the extent to which claims for consequential damages arising out of a violation of neutrality in such a case as that of the "Alabama" may be entertained.

The case also contains some important expressions of opinion as to the position of prizes brought by a belligerent captor into neutral territory. With regard to these, it is generally admitted that, though the neutral must not permit any Prize Court to be erected within his territory, yet International Law does not, as yet, require the neutral to prevent either belligerent from bringing his prizes into a neutral port, or even from selling them after condemnation in his own country. Where, however, its neutrality has been violated by the capture, the neutral Government ought to restore the prize. It seems to be the better opinion that the fact of the prize having been taken *infra præsidia*, will not affect the neutral jurisdiction (y).

It should be noted that both the sale and deposit of prizes within neutral territory are frequently forbidden by Municipal Law. On the 1st of June, 1861, instructions were dispatched from the British Foreign Office to the Commissioners of the Admiralty, to the effect that neither war vessels nor privateers of the parties engaged in the American Civil War, should be allowed to carry their prizes into British jurisdiction. On the 10th of June, 1861, a similar proclamation was made by the French Government. It seems probable that this will ultimately be recognized as an obligation imposed by International as well as Municipal Law.

THE "TUSCARORA" AND THE "NASHVILLE."

Temp. 1861—1862.

[BERNARD'S BRITISH NEUTRALITY DURING AMERICAN CIVIL WAR, 267.]

Case.] During the American Civil War, the Confederate cruiser, the "Nashville," put into dock at Southampton.

(y) See p. 160, *supra*.

Thereupon, the United States corvette "Tuscarora" also proceeded to Southampton, and took up her station at the head of Southampton Water, with the object of preventing the "Nashville" from leaving the harbour. The "Tuscarora" employed agents in Southampton, who gave her prompt notice of impending departure on the part of the "Nashville." By keeping up steam and riding with slips on her cable, the "Tuscarora" was thus enabled to precede the "Nashville" whenever the latter proposed to depart. It is a well established rule of International Law, that when the cruisers of two belligerents enter a neutral port one shall not be allowed to leave within twenty-four hours of the other. The "Tuscarora" thus precluded the "Nashville" from leaving for twenty-four hours. Before the twenty-four hours had elapsed, the "Tuscarora" returned to her station, repeating the operation whenever she was advised that the "Nashville" intended leaving. The "Nashville" was thus practically blockaded in an English port.

The Tuscarora and the Nashville, Bernard's British Neutrality during American Civil War, 267.

This case had the effect of calling attention to the defect of International and Municipal Law in this respect; and to guard against a similar occurrence, it was provided by a British Order in Council, that during hostilities any vessel of either belligerent entering a British port should be required to depart within twenty-four hours after entrance, except in case of stress of weather, need of repairs, or need of provisions, or other things necessary for the subsistence of her crew, and in such cases the authorities were to require her to put to sea as soon as possible after the twenty-four hours.

EXCURSUS IV.—THE HISTORY OF THE GENEVA ARBITRATION AND AWARD (2).

Temp. 1872.

[PAPERS RELATING TO THE TREATY OF WASHINGTON, VOLS. I. TO IV.,
PUBLISHED AT WASHINGTON, 1872—1873.]

During the continuance of the American Civil War, representations were from time to time made by Mr. Adams, the United States minister

(2) It has been thought desirable to throw this into the form of an Ex-

in London, to the British Government, concerning the different vessels which were alleged to have been fitted out, or to have committed acts in violation of British neutrality. In his correspondence he pointed out the material facts relating to the cases, and suggested that means should be taken to prevent the departures of the vessels. All consequent losses suffered by the United States were submitted to the British authorities.

In February, 1863, Mr. Adams called the attention of Earl Russell to the following facts :—(1.) That contracts were then already made for the construction of ironclad fighting ships in England ; (2.) That Fraser, Trenholm & Co., were the depositaries of the insurgents at Liverpool, and that the money in their hands was to be applied to the contracts ; (3.) That they were to pay for purchases made by Confederate agents ; (4.) That contracts for the construction of other vessels besides the ironclads referred to, had been taken by parties in Great Britain ; (5.) That parties in England were arranging for an insurgent cotton loan, the proceeds of which were to be deposited with Fraser, Trenholm & Co., for the purpose of carrying out all their contracts.

In April, 1865, after hostilities had virtually terminated, Mr. Adams informed Earl Russell that the United States Government held the British Government responsible for what had occurred. Besides direct damages, claims were made for indirect damages, arising from the fact that, in consequence of the outfit of the vessels referred to, a large proportion of the American 'commercial marine had been transferred to Great Britain, the rates of insurance had become higher, the war had been prolonged, and the cost of quelling the rebellion had thereby been increased.

On the 26th of October, 1863, Mr. Adams had proposed to Earl Russell "some fair and conventional form of arbitrament and reference" for the settlement of the claims. In 1865, Earl Russell, referring to that offer, declined on behalf of the British Government either to make any compensation for the captures made by the "Alabama," or to refer the question to any foreign State. In the same letter, referring to the claims for indirect damages, it was pointed out that if the liability of neutral nations was stretched so as to include such claims as these, a maritime nation, whose people occupied themselves in constructing ships and cannon and arms, might be made responsible for the whole damages of a war in which that nation had taken no part. In 1866, a change of ministry took place in England. Earl Russell's reply to the United States demands was reconsidered by the Derby Cabinet, and a long negotiation was entered on. A con-

course, inasmuch as the following account includes the history of negotiations, which could scarcely be classed

either under the head of Cases or Opinions.

vention on the subject was signed in London in November, 1868. This proved unacceptable to the United States Senate. Negotiations were, however, renewed, and in the result a treaty known as the Johnson-Clarendon Convention was concluded in January, 1869. By that convention, provision was made for the appointment of a Mixed Commission, with jurisdiction over all claims on the part of the United States against Great Britain, including the "Alabama" claims, and all claims on the part of Great Britain against the United States, arising since July, 1853. The treaty did not, however, receive the assent of the United States Senate, in consequence of its not stating in sufficiently unequivocal terms that all national claims were included. On the 15th of May, Mr. Motley, on behalf of the United States, informed Lord Clarendon, who conducted the negotiations on behalf of Great Britain, that the United States, in rejecting the treaty, "abandoned neither its own rights nor those of its citizens." Towards the end of 1870, a special envoy was sent to the United States by the British Government for the purpose of settling the differences which had arisen out of the Fisheries Question, and, in January, 1871, Sir Edward Thornton proposed the appointment of a Joint High Commission for this purpose. Mr. Fish, on behalf of the United States, suggested that the commission should also deal with the "Alabama" claims, and, in consequence of this suggestion, commissioners were appointed by the two countries; Lord de Grey, Sir Stafford Northcote, Professor Bernard, Sir Edward Thornton, and Sir John Macdonald, acting on behalf of Great Britain, and Mr. Hamilton Fish, General Schenck, Mr. Justice Nilson, Mr. Ebenezer Hoar, and Mr. George H. Williams, acting on behalf of the United States.

The United States commissioners suggested that a sum should be agreed upon to be paid by Great Britain to the United States in satisfaction of all claims, but this proposal was not acceded to. The British commissioners then suggested that the principle of arbitration should be adopted. The American commissioners replied that they could not consent to arbitration unless the principles to govern the arbitrator in the consideration of the facts were previously agreed upon. The British commissioners, on the other hand, suggested that the facts only should be submitted to the arbitrator, and he should be at liberty to decide upon them after hearing such arguments as might be necessary. Ultimately certain rules proposed by the American commissioners were agreed to by Great Britain, and after a discussion lasting over several weeks, a treaty, known as the Treaty of Washington, was concluded on the 8th of May, 1871.

By this Treaty all claims known as the "Alabama" claims were to be referred to five arbitrators, to be named as therein mentioned; the arbitrators were to meet at Geneva; provision was made as to the mode of procedure; finally, the arbitrators were to be governed by three rules agreed upon by the parties as applicable to the case.

The following are the rules referred to:—A neutral government is bound: (1.) To use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction of any vessel, which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part within such jurisdiction to warlike use; (2.) Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies, or arms, or the recruitment of men; (3.) To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

With regard to these rules the English Government intimated that whilst it could not assent to them as a statement of the principles of International Law in force at the time when the claims arose, yet the arbitrators might assume that it had agreed to act upon the principles set forth in the rules.

It was further provided by the Treaty that the tribunal should decide whether Great Britain had failed in any of her duties in regard to each vessel. Minute provisions were also inserted as to the mode of determining the amount of the claims (*a*).

In pursuance of the Treaty an arbitration was held at Geneva, the meetings extending from the 15th of December, 1871, to the 14th of September, 1872. The tribunal was composed of Mr. Charles Francis Adams, representing the United States, Sir Alexander Cockburn, representing Great Britain, Count Sclopis, nominated by the King of Italy, Mr. Staempfli, nominated by the President of the Swiss Republic, and the Vicomte d'Itajuba, nominated by the Emperor of Brazil.

A preliminary question was raised as to the competency of the tribunal to deal with the indirect claims. The majority of the tribunal expressed their opinion that those claims did not constitute, upon the principles of International Law applicable to such cases, a good foundation for an award of compensation, or for computation of damages between nations, and should on such principles be wholly excluded from the consideration of the tribunal in making its award, even if there were no disagreement between the two Governments as to the competency of the tribunal to decide thereon. This opinion was accepted by the President of the United States as determinative

(*a*) Other clauses of the Treaty dealt with the Fisheries Question and to the settlement of the Pacific boundary. The former question was settled for the future, the existing claims being re-

ferred to a commission. The latter question was referred to the Emperor of Germany. See *International Disputes* (*infra*, pp. 255 and 260).

of the arbitrators' judgment upon the question, and the claims were withdrawn from the consideration of the tribunal.

The general grounds of complaint urged against Great Britain were: (1.) That British territory was during the whole struggle the base of the naval operations of the insurgents; (2.) That the insurgents had been allowed to make use of British territory as an arsenal and base of supplies; (3.) That Great Britain had displayed a continuing partiality for the insurgents; (4.) That there was a want of due diligence to prevent the acts complained of (*b*).

On the 26th of August, 1872, the arbitrators expressed an unanimous approval of the principle that Great Britain should be considered as responsible for the tenders, as well as for the ships to which they were attached.

After laying down several important principles relating to the interpretation of the rules of the Treaty of Washington, upon which their decision was based, the arbitrators came to the following conclusions:

(1.) With respect to the "Alabama," four of the arbitrators held that Great Britain had failed to fulfil the duties prescribed by rules (1) and (3), on the ground that, notwithstanding the warnings given her, she omitted to take effective preventive measures; that the measures taken for the pursuit and arrest of the vessel were imperfect; that the vessel was on several occasions freely admitted into British colonial ports instead of being proceeded against, and that the British Government had failed to justify such want of due diligence.

(2.) With respect to the "Florida," four of the arbitrators held that Great Britain had also failed in the observance of her neutral duties as defined by the Treaty; this in respect of her original construction and outfit, her subsequent admission into British ports, and her treatment by the colonial authorities, as appeared from the facts relative to the stay of the vessel at Nassau, her issue from that port, her enlistment of men, her supplies, and her armament at Green Cay.

(3.) With respect to the "Shenandoah," the arbitrators unanimously held that Great Britain had not failed to fulfil any of its duties anterior to the entry of the vessel into Melbourne; but three were of opinion that there had been a failure in respect of the duties prescribed by rules (2) and (3), after her entry into Hobson's Bay, since there was negligence on the part of the Melbourne authorities, especially in connection with the augmentation of force there.

(4.) With respect to the "Tuscaloosa," "Clarence," "Tacone," and "Archer," tenders to the "Alabama" and "Florida," a majority of the tribunal held that Great Britain was responsible in respect of them.

(5.) With respect to the other vessels, the tribunal held that Great Britain had not failed to fulfil any of its duties.

(6.) Three of the arbitrators held that damages in respect of the

(*b*) As to the grounds of complaint pp. 192 to 198, *supra*.
in respect of each particular vessel, see

costs of the pursuit of the cruisers should not be awarded, inasmuch as those costs were not properly distinguishable from the general expenses of the war.

(7.) It was unanimously held that damages in respect of prospective earnings should not be awarded, inasmuch as they could not properly be made the subject of compensation, depending as they did upon future and uncertain contingencies.

(8.) The tribunal, by four votes to one, awarded to the United States \$15,500,000 as an indemnity.

The principles of interpretation on which the arbitrators proceeded were as follows: (1.) The "due diligence" referred to in the rules mentioned above, ought to be exercised by neutral governments in proportion to the risks to which either belligerent may be exposed by their failure to fulfil neutrality obligations; (2.) The circumstances out of which the matter in controversy arose were such as to call for the exercise by the British Government of all possible solicitude for the observance of the rights and duties involved in Great Britain's declaration of neutrality; (3.) The effects of a violation of neutrality through the construction, equipment, and armament of a vessel, are not done away with by any commission which the government of the belligerent may afterwards have granted to the vessel, and the ultimate step by which the offence is completed cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence; (4.) The privilege of extritoriality accorded to war ships has been admitted into the Law of Nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual defence between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality; (5.) The absence of a previous notice cannot be regarded as a failure in any consideration required by the Law of Nations, in those cases in which a vessel carries with it its own condemnation; (6.) In order to impart to supplies of coal a character inconsistent with the rule prohibiting the use of neutral ports or waters as a base of naval operations, it is necessary that the supplies should be connected with special circumstances of time, person, or place which may combine to give them such character.

The History of the Geneva Arbitration and Award, Papers relating to the Treaty of Washington, Vols. I. to IV. (Publ. at Washington, 1872, 1873) (b).

(b) The rules of the Treaty of Washington, and the principles of interpretation laid down by the arbitrators seem to have been unfavourably commented on both by jurists and politicians. The Treaty itself has been found fault with, as affirming a neutral obligation to use due diligence, without making any attempt to define or ascertain what due diligence is. The exposition of due diligence given by the tribunal has been assailed as even more perilous. It is suggested that such an extension of existing rules will

RIGHTS AND LIABILITIES OF NEUTRAL TRADE.

THE "ATLAS."

Temp. 1801.

[3 C. ROB. 299.]

Case.] During war between Great Britain and Spain, a cargo of tobacco was dispatched from the United States on board an American ship "to Vigo or some other market." The cargo was consigned to the master for the purpose of sale. At Vigo it was sold to the Spanish Government, the master having agreed to deliver it at Seville. The ship was captured in 1801, by a British cruiser, on the voyage from Vigo to Seville, and brought in for adjudication.

Judgment.] The cargo, even though taken on a neutral ship, was condemned on the ground that it was taken whilst going to an enemy's port to be delivered there to an enemy, and to be paid for by him, having actually become his

merely afford a pretext for future claims without affording any means of deciding them, and so put a premium on international disputes.

It is no doubt true that both the rules and the principles of interpretation are somewhat loosely expressed; neither can one seek to condone so grave a defect. Still, it is necessary to remember that it is as impossible in International, as it is in municipal law, to set up any exact standard of diligence. Decisions and supplementary rules may gradually mark out the limits of care required in special cases, but outside these limits the vague standard of reasonable or due care must inevitably obtain, varying with prevalent conditions and necessities.

The limitation set up in regard to the principle of the extritoriality of public vessels has also been found fault with; but apart from the danger of even seeming to make extritoriality an independent source of legal right, there can be no doubt that such a limitation ought to have the effect of rendering the discharge of neutral

obligations far easier than it would otherwise be; and it is difficult to see how such a restriction is likely in any way to fetter the legitimate privileges of those public vessels which have been guilty of no violation of neutral jurisdiction. But for such a limitation it would only be necessary to furnish a ship, fitted out under circumstances involving the most flagrant violation of another nation's neutrality, with a commission, in order to secure her complete immunity from the consequences of her wrong-doing.

It is of course true, that the principles of the Treaty of Washington do not, *per se*, constitute law between other nations, and that the principles of interpretation adopted by the Geneva Tribunal will not necessarily bind other boards of arbitration, but it is probable that some such principles as those affirmed will, as being more in harmony with the exigencies of modern warfare than those previously existing, ultimately find their way into the Code of Nations.

property under an engagement entered into by the agent appointed for the management of the cargo. The contract under which it went was absolute and indefeasible; the goods could be considered in no other light than as the property of an enemy. The ship was restored; but freight was refused, as the cargo had been captured in course of a voyage, in which the vessel was engaged in the coasting trade of the enemy.

The Atlas, 3 C. Rob. 299.

The decision in this case seems to have followed that of the "*Sally*" (1795, cited in note to *Atlas*, 3 C. Rob. 300). In the latter case the House of Lords determined that a cargo of wheat dispatched on board an American vessel during war between Great Britain and France nominally on account and at the risk of certain American merchants or their assigns, but really intended for the Mayor of Havre, was liable to condemnation as enemy property even though captured on a neutral vessel.

The case, however, is cited here rather as illustrating the liabilities incurred by a neutral vessel whilst engaged in carrying enemy property, according to the doctrine originally adopted by the English courts and still prevailing in regard to the subjects of those States which have not signified their adherence to the Declaration of Paris, 1856.

On the subject of the liability of enemy property on neutral vessels two distinct principles have at different times prevailed. According to one principle the nationality of the property determined its liability. Under this doctrine neutral goods went free, even though found on hostile ships, and hostile goods were liable to seizure even though found on neutral ships. While this principle prevailed a captor who took hostile goods out of a neutral ship was in general liable to pay freight to the neutral shipowner, as shown by the judgment in the case of the "*Bremen Flugge*" (cited below). On the other hand a belligerent capturing a hostile ship with neutral goods on board was entitled to claim freight if he forwarded the goods to their original destination. This is illustrated by the case of the "*Fortuna*" (cited below).

According to the other principle, the nationality of the ship determined liability to capture. Under this doctrine neutral goods on hostile ships were liable to confiscation, while hostile goods on neutral ships went free. Neutrals were interested in the establishment of this principle, inasmuch as under it their maritime traffic was likely to be greatly increased.

The two propositions, however, which this principle involves, viz., that free ships make free goods, and enemy's ships make enemy goods, are not necessarily concurrent. The doctrine of "Free ships free goods" was frequently adopted without the corresponding doctrine "Hostile ships hostile goods" (c). Thus in the case of the "*Cygnnet*" (2 Dods. 299), during war between Great Britain and the United States, a Spanish cargo on board a British ship was taken by an American privateer and retaken by a British man-of-war. The title of the recaptors to salvage on the cargo turned on the question whether the cargo would have been liable to condemnation in the United States courts. It appeared that by the Treaty of Commerce between Spain and the United States it was stipulated that free ships should make free goods. The recaptors argued that from the stipulation referred to, it was fairly to be inferred that enemy's ships should make enemy's goods. The Court was of opinion that the mere argument of inference did not warrant such a conclusion, and rejected the claim of the recaptors on the assumption that the United States courts would not have condemned.

The earlier principles which prevailed on this subject have now, however, been extensively modified by convention between the principal European nations. On the outbreak of the Crimean War Great Britain, by an order in council dated 28th March, 1854, announced her intention of waiving the right of seizing enemy property on neutral ships, except contraband of war; this without modifying the previous immunity which neutral goods on enemy vessels had enjoyed under her rule. France, on the other hand, acceded to the principle of the immunity of neutral goods on enemy ships, without qualifying the principle on which she had previously acted, as to the immunity of hostile goods on neutral ships.

After the termination of the war the following principles were adopted in regard to neutral trade in time of war, by the various Powers who were parties to the Treaty of Paris, 1856, and embodied in a formal Declaration—(1.) that the neutral flag should cover an enemy's goods except contraband of war; (2.) that neutral goods, except contraband of war, should not be liable to capture under the enemy's flag. Both these and the other principles of the Declaration of Paris have now been acceded to by all civilized States, except the United States, Spain, and Mexico (cc).

(c) For a history of these principles, including an account of the First Armed Neutrality of 1780, and the Second Armed Neutrality of 1800, the reader is referred to Woolsey, *International Law*, p. 316.

(cc) The other principles of the Declaration of Paris were (1) "Privateering is and remains abolished," see p. 94, *supra*; (2) "Blockade to be binding must be effectual," see p. 216, *infra*.

Thus, as between all other important States, neutral goods are now exempt from capture on enemy vessels, whilst enemy goods enjoy the same immunity on neutral vessels. It would seem, however, that according to the views of the French prize courts, the neutral, though his goods found on board an enemy vessel are not liable to capture, is yet not entitled to compensation if his goods are destroyed. In the case of the "*Norwaerts*" (Dalloz, *Jurisprudence Générale*, 1872, Part III. p. 94), it appeared that, during the Franco-Prussian War a German vessel was captured by a French cruiser and burnt, the captor not having the means of taking the prize into port. The cargo was the property of Messrs. Gabriel & Co., an English firm. An application was subsequently made on Messrs. Gabriel's behalf for compensation, on the ground that the destruction of English goods was contrary to the Declaration of Paris of 1856. The application was however refused by the Conseil d'Etat, it being held that the Declaration did not give neutrals the right of indemnity against losses arising from lawful capture, or from acts of war accompanying or succeeding such a capture. This decision was followed in the case of the "*Ludwig*," in which the facts were similar to those of the "*Norwaerts*."

THE "*FORTUNA*."

Temp. 1802.

[TUDOR'S LEADING CASES, 1041 ; 4 C. ROB. 278.]

Case.] During war between Great Britain and the United States, the "*Fortuna*," an enemy's ship, laden with a cargo of corn, was captured by the British, and brought in for adjudication. The ship was condemned, but the cargo was restored as neutral property and was forwarded to Lisbon, its original destination, where the consignee was put into possession. The case came before the Court on an application by the captors for freight.

Judgment.] Sir William Scott, in his judgment, held them entitled to freight on the same principle as that on which a captor would not have been entitled if he had not proceeded and performed the original voyage. The specific contract was performed in the one case and would not have been performed in the other. This was in accordance with the principle laid

down in the case of the "Vreyheid," that the captor who had performed the contract of the vessel was, as a matter of right, and *de cursu*, entitled to freight; although if he had done anything to the injury of the property, or had been guilty of any misconduct, he might remain answerable for the effect of such misconduct or injury by way of set-off against him.

The Fortuna, Tudor's Leading Cases, 1041; 4 C. Rob. 278.

As long as the principle by which the nationality of the property determined its liability to condemnation prevailed, the captor who took an enemy vessel with neutral goods on board, was entitled to be paid freight if he forwarded the goods to their destination. The rule was the same if the goods belonged to subjects of the belligerent effecting the capture, the goods being restored subject to payment of freight, except when liable to condemnation as having been engaged in illegal traffic.

In the case of the "Diana" (5 C. Rob. 67), some Dutch ships had been captured, apparently in anticipation of the war which afterwards broke out between Great Britain and Holland, while on a voyage from the Dutch colonies to Amsterdam. The cargoes belonged to British subjects and were ultimately destined for Great Britain, although by the law of Holland they had to be taken in the first instance to Holland. The ships were condemned, but the cargoes were restored. The matter came before the Court on the question of the liability of the owners to pay freight to the captors. Sir William Scott, in his judgment, stated that the owners had obtained restitution in their own country, and in the very port which they would have elected, if they had not been prevented by the law of Holland, and under these circumstances he held that they were liable for freight.

THE "BREMEN FLUGGE."*Temp.* 1801.

[TUDOR'S LEADING CASES, 1045 ; 4 C. ROB. 90.]

Case.] During the war which prevailed at the beginning of this century, between Great Britain and France, the "Bremen Flugge" was captured by a British vessel, and brought in for adjudication, but was subsequently released as a neutral ship. Part of the cargo had been condemned as enemy property. £1,050, part of the proceeds of the condemned cargo, had been paid in discharge of freight, and the present action was brought to determine the question whether, under a decree for expenses, the captor or the master was first entitled to the residue of the proceeds of sale of the cargo.

Judgment.] Sir William Scott, in giving judgment, stated that a neutral had a right to carry the property of the enemy, but subject to the right of the belligerent to bring in the ship for the purpose of procuring condemnation of the cargo. It was then generally held that a neutral vessel so engaged was not subject to any penalty, but that she was even entitled to her freight as a lien attaching to the cargo. The freight attached as a lien, provided there were no unneutral circumstances in the conduct of the ship to induce a forfeiture of the demand. The learned judge went on to say, however, that a claim for expenses was not a claim which the neutral was entitled to urge on the same ground, or in the same manner, and finally held that after payment of freight the captor's claim to the residue of the cargo was to be preferred to that of the neutral master under a decree for expenses.

The Bremen Flugge, Tudor's Leading Cases, 1045 ;
4 C. Rob. 90.

In the event of the capture of a neutral ship with enemy goods, the neutral became entitled to freight, but as appears from the above case this did not extend to other expenditure.

DARBY v. THE BRIG "ERSTERN."

Temp. 1782.

[2 DALLAS, 34.]

Case.] During war between Great Britain and the United States, the Island of Dominica capitulated to the United States. Thereupon commercial intercourse between Great Britain and the island was prohibited. Certain British subjects subsequently attempted to evade this prohibition, by trading through the medium of Ostend, a neutral port. In the present case, which came before the Court in 1782, it appeared that the brig "Erstern," a neutral ship, had cleared from London with a cargo belonging to British subjects ostensibly for Ostend. She arrived at Ostend, but subsequently cleared for Dominica with the cargo brought from London. The vessel was captured by a United States cruiser on the ground of having intended a violation of the capitulation of the island, and was brought in for adjudication. She was acquitted by the local Court of Admiralty, but on appeal to the Federal Court of Appeal, the decree was reversed, and the brig and cargo condemned on the ground that the ship had exceeded the rights accorded to neutral vessels.

Judgment.] The Court, in its judgment, stated that if the brig had been employed in a fair commerce, such as was consistent with the rights of neutrality, the cargo, though the property of an enemy, could not have been liable to condemnation; because, by an Act of Congress, it had been provided that the rights of neutrality should extend protection to the goods of an enemy on a neutral ship. But if the rights of neutrality were exceeded, Congress had not enacted that a violated neutrality should afford such protection, nor could this have been done without confounding all distinctions between right and wrong.

Darby v. The Brig Erstern, 2 Dall. 34.

This case is cited as illustrating the principle that even where, by treaty, the neutral flag covers the goods, yet it must not be made the medium of illicit trade between the enemy's country and that of the captor. This limitation has become all the more important since the general acceptance of the principle, that a neutral flag covers hostile goods, by the Declaration of Paris (*d*).

BLOCKADE.

THE "BETSEY."

Temp. 1798.

[TUDOR'S LEADING CASES, 1013 ; 1 C. ROB. 93.]

Case.] During war between England and France, the "Betsey," an American ship, was taken by the English at the capture of Guadaloupe. The island was within six weeks recaptured by the French, and the property in the "Betsey" thus became vested in the French recaptors. The first captors were called upon to proceed to adjudication by the original owners of the property. The latter claimed restitution in value of the property, on the ground that the ship and cargo were neutral property which had not been engaged in any unlawful traffic. The first seizure was defended on the ground that the ship had broken the blockade of Guadaloupe. It appeared that previous to the capture of the island the English had proclaimed it to be in a state of blockade, but no actual blockade appears to have been established.

Judgment.] It was laid down in the judgment, that in order to apply the law of blockade, three things must be proved ; first, the existence of an actual blockade ; secondly, the knowledge of the party ; and thirdly, some act of violation either by going in or coming out with a cargo laden after the commencement of the blockade. It was therefore held that

(*d*) See pp. 207 and 208, *supra*.

so far as the question of breach of blockade was concerned the case would have been one for restitution.

The Court then proceeded to consider whether the property having been retaken with the island by the French, the captors remained liable to the American owners. This depended on the question whether the possession of the original captors was in its commencement a legal and *bonâ fide* possession; and if so, whether it became by any subsequent conduct of the captors tortious and illegal. It was held to be clear law that a *bonâ fide* possessor was not responsible for casualties (such as the recapture by the French); but that he might by subsequent misconduct forfeit the possession of his fair title, and render himself liable to be considered as a trespasser *ab initio*, and hence responsible for such casualties. Applying these principles to the case in question, the Court pronounced the original seizure justifiable on the ground that, as the British forces were at the time advancing against the Island of Guadeloupe, and as the planters would have been eager to avail themselves of neutral services to screen their property, strong suspicions attached to all ships found in the harbours of Guadeloupe. Neither could the captors be held to have vitiated their original fair title, so as to render themselves responsible for subsequent casualties, by any irregularity or unnecessary delay. The recapture having followed so closely on the original seizure, it did not seem that there had been either an opportunity for erecting a prize court on the spot, or for sending the ship home for adjudication. Under the circumstances the captors were discharged from all further proceedings.

The Betsey, Tudor's Leading Cases, 1013; 1 C. Rob. 98.

Blockade is the obstruction of passage to or from a place by land or sea (*d*). Neutrals are, however, seldom affected by land sieges, and

blockade generally takes effect on a seaport, a roadstead, a portion of the coast, or the mouth of a river.

The usual and regular mode of enforcing blockades is, in the words of Sir William Scott, "by stationing a number of ships and forming, as it were, an arch of circumvallation round the mouth of the prohibited port. Then if the arch fails in any one part the blockade fails altogether." (1 Dods. 425.) The ships must be stationed in such numbers and in such a manner as to cause danger to any vessel endeavouring to enter. The essentials of liability for breach of blockade, as laid down in the "*Betsey*," are (1) the existence of an actual blockade; (2) knowledge of the party, and (3) some act of violation by entering or attempting to enter, or by coming out after time.

On the question of knowledge, there seems to be some divergence between the practice of the English and American prize courts on the one hand, and that of the French and continental prize courts on the other hand. The views of the English courts on this subject are clearly expressed by Sir W. Scott in the case of the "*Neptunus*" (2 C. Rob. 110). In that case a neutral vessel had been captured by the British, whilst on a voyage from Dantzic to Havre, then under blockade. The blockade had been previously notified to neutral governments, but the master was ignorant of the fact. It also appeared that the master of the "*Neptunus*" had been previously informed by an officer of Admiral Duncan's fleet that the port of Havre was not under blockade. In his judgment Sir W. Scott stated in effect that a distinction existed between a blockade *de facto* and a notified blockade. In the former case, no presumption arose as to the continuance of the blockade, and the ignorance of the party might be admitted as an excuse for sailing on a doubtful or provisional destination. But in the case of a notified blockade, it was the duty of foreign governments to communicate the fact of a blockade to their subjects. He held that a neutral master could never be permitted to aver as against such a notification of blockade that he was ignorant of it. If he was really ignorant of it, this might be a ground for claiming compensation from his own Government, but it could be no plea in the Court of a belligerent. In view, however, of the communication made to the master of the "*Neptunus*" by an officer of the English fleet, Sir W. Scott held that the vessel was not taken *in delicto*, and both ship and cargo were ordered to be restored.

Thus it seems that Great Britain and the United States recognise two kinds of blockade, one *de facto*, without proclamation, and the other by proclamation. In the former case no vessel incurs liability unless there has been express warning. In the latter case a general notification of the impending blockade is given to neutral States. If there has been time to receive this, the mere sailing with an in-

tention to break blockade will be sufficient to warrant condemnation. The intention may be gathered from such overt acts as starting for a blockaded port after notice, the use of false papers or spoliation of papers, or a change of course undertaken in order to avoid search.

By the law of France, whether the blockade be by notification or *de facto* only, there must be a special warning to a ship about to enter indorsed on the ship's papers.

The other aspects of the Law of Blockade will be gathered from the cases cited in the text, whilst the cases cited under the doctrine of Continuous Voyages well indicate how greatly the liability of neutrals in this department has been extended in modern times.

THE "HENRICK AND MARIA."

Temp. 1799.

[1 C. Rob. 146.]

Case.] During war between this country and Holland, the "Henrick and Maria," a Danish ship, was taken for breaking the blockade of Amsterdam. The master was warned "not to proceed to any Dutch port," Amsterdam being the only Dutch port blockaded.

Judgment.] It was held that the notice was illegal, and the ship was therefore not liable to condemnation; the rule being that if a belligerent has proclaimed a blockade of several ports, when he has only blockaded one, a neutral is at liberty to disregard the notice, and is not liable to the penalties of breach of blockade for attempting to enter the port really blockaded.

The Henrick and Maria, 1 C. Rob. 146.

The principle indicated is part of a larger principle, that blockade to be binding must be effectual. What is known as a paper or cabinet blockade consists in a declaration of intention to blockade a place or a tract of coast, without stationing a force adequate to

support the blockade. Such a declaration is ineffectual, and cannot by the Law of Nations affect a neutral with liability.

By the Declaration of Paris, 1856, it was provided that "blockades in order to be binding must be effectual, that is to say, maintained by a force sufficient in reality to prevent access to the coast of the enemy." This provision, however, does not seem to do more than formulate an existing principle, and can scarcely be said to afford any practical test of the sufficiency of a blockade (*f*). It is worthy of note that on the declaration by Admiral Courbet on the 20th Oct. 1884, of the blockade of all the ports and roads between certain points of the Island of Formosa, the English Government protested against this measure as being in violation of the Declaration of Paris.

THE "COLUMBIA." †

Temp. 1799.

[1 C. ROB. 154.]

Case.] The master of an American ship was instructed by the owners to go north about as far as Cuxhaven and thence to Hamburg, where he was to put himself under the directions of Messrs. Boué & Company. Having arrived at Hamburg, Messrs. Boué directed him to proceed to Amsterdam, if the winds should be such as to keep the English fleet at a distance. Both the master and the consignees at Amsterdam knew at the time of the ship's sailing for that port, that it was blockaded.

Judgment.] It was held that the mere sailing with an intention of evading the blockade, in the event of this being possible through the absence of the blockading squadron caused by adverse weather, constituted a breach of the blockade; and that the act of the master affected the owner of the vessel to the extent of the whole of the latter's property concerned in the transaction.

The Columbia, 1 C. Rob. 154.

A blockade is not suspended by the occasional absence of the blockading squadron caused by adverse weather, provided that the station is resumed with due diligence. The law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade and as a ground of confiscation.

THE "GERASIMO."

Temp. 1857.

[11 MOORE, P. C. C. 88.]

Case.] During the Crimean War, a ship, under Wallachian colours, with a cargo of corn belonging to owners residing at Galatz, in Moldavia, was seized when coming out of the Sulina mouth of the Danube, for breach of the Black Sea blockade. When the shipment was made, the Russians held possession of Moldavia and Wallachia, but such holding was with the expressed intention of not changing the national character or incorporating the country with Russia.

Judgment.] It was held that the claimant was not under the circumstances an alien enemy, the national character of a place not being changed by its being in the possession of a hostile force. It was also held that, the object of the blockade being to prevent the import of provisions, the fact of a neutral ship bringing out a cargo of corn did not constitute a breach of the blockade.

The Gerasimo, 11 Moo. P. C. C. 88.

THE "FREDERICK MOLKE."↓

Temp. 1798.

[TUDOR'S LEADING CASES, 1011; 1 C. ROB. 86.]

Case.] In 1798, during war between Great Britain and France, the "Frederick Molke," a Danish vessel, broke through

the blockade established by the English at Havre, and delivered her cargo. She then took on board a fresh cargo, and was, when attempting to leave the port, captured for breach of blockade, and subsequently brought in for adjudication. The ship and cargo, being the property of the same person, were both condemned.

Judgment.] Sir William Scott laid down in his judgment, that the act of egress was as culpable as that of ingress; a ship coming out of a blockaded port was in the first instance liable to seizure, and in order to obtain her release very satisfactory proof of innocence must be given.

The Frederick Molke, Tudor's Leading Cases, 1011 ;
1 C. Rob. 86.

Breach of Blockade may be either by ingress or egress. With regard to ships already in the blockaded port, it is usual for the blockading power to allow a limited number of days within which vessels may quit. Fifteen days may be considered as the shortest period adopted in practice. On the blockade of Buenos Ayres, in 1838, France allowed neutral ships forty-two days to come out. Ships in ballast are even allowed to come out at any time.

The penalty for breach, whether by ingress or egress, continues till the end of the return voyage, unless the blockade has meanwhile been discontinued. Thus in the case of the "*Welvaart van Pillaw*" (2 C. Rob. 128), a Prussian ship was taken in April, 1799, off Dungeness, and proceeded against for a breach of the blockade of Amsterdam, having sailed from thence with a cargo in March. It was urged on the claimant's behalf, that the capture was not made by any blockading force nor near the mouth of the port. Sir Wm. Scott stated that if the principle was sound, that a neutral vessel was not at liberty to come out of a blockaded port with a cargo, he knew no other natural termination of the offence but the end of the voyage, and he would hold that if a ship that had broken a blockade was taken in any part of that voyage she was taken *in delicto* and was subject to confiscation. •

NORTHCOTE v. DOUGLAS, THE "FRANCISKA." †*Temp.* 1855.

[10 MOORE, P. C. C. 37.]

Case.] In May, 1854, the Danish schooner "Franciska" was seized by one of Her Majesty's ships near the entrance of the Gulf of Riga, and sent home for adjudication, on the ground of having attempted to break the blockade of the Russian ports. It appeared that a blockade had been actually established, but that the English Government had given the Russians permission to export goods from blockaded Russian ports in the Baltic and the White Sea, and that a similar permission had been given by the French Government.

Judgment.] It was held that, as the permission relaxed the blockade in favour of the belligerents to the exclusion of neutrals, the blockade was illegal; both on this and other grounds restitution was decreed, the sentence of the Court below condemning the vessel being reversed.

Northcote v. Douglas, The Franciska, 10 Moore,
P. C. C. 37.

The principle of this decision is that blockade must be against all vessels, otherwise it will not be deemed effectual.

THE "OCEAN." †*Temp.* 1801.

[3 C. ROB. 297.]

Case.] During war between England and Holland the "Ocean" was brought in for adjudication, on the ground of having violated the blockade of Amsterdam. It appeared that the cargo of the "Ocean" had been ordered for shipment

from Amsterdam to America, subsequently to the date of the blockade of that place, but previously to the blockade of the other ports of Holland. The goods were then sent overland from Amsterdam to Rotterdam, and thence shipped for America.

Judgment.] It was held that the internal communications of the country were in no way subject to the operation of the blockade, and restoration was decreed.

The Ocean, 3 C. Rob. 297.

The principle of this case is, that if a place be blockaded by sea it is no violation of belligerent rights for a neutral to carry on commerce with it by means of inland communications.

THE "MERCURIUS."

Temp. 1798.

[1 C. Rob. 80.]

Case.] The "Mercurius" was captured in 1798 whilst on a voyage from Baltimore to Amsterdam, the latter place being then under blockade. The ship was the property of a merchant of Hamburg, but the cargo belonged to a citizen of the United States.

Judgment.] Sir W. Scott, in giving judgment, laid down the principle that a blockade might exist without a public declaration, although a declaration unsupported by proof of actual blockade would not be sufficient. The ship was condemned, on the ground that the master intended to proceed to Amsterdam in defiance of a prohibition given him by an English officer who came on board. Sir W. Scott then proceeded to consider how far, under these circumstances, the guilt of the ship could be said to affect the cargo. On this subject it was

laid down that in order to maintain that the conduct of the ship affected the cargo, it would be necessary either to prove that the owners were, or might have been, cognizant of the blockade, before they sent their cargoes; or to show that the act of the master of the ship personally bound them. Neither of these matters having been shown in the case, restoration of the cargo was in effect decreed subject to further proof.

The Mercurius, 1 C. Rob. 80.

This case is cited mainly as containing an important judgment on the subject of liability of cargo. The confiscation of a vessel attempting a breach of blockade does not necessarily involve the confiscation of the cargo if the owners are different. As laid down in the "*Mercurius*," to warrant condemnation of the cargo there must be proof that the owners either knew or might have known of the blockade, at the time the cargo was shipped; or else that they constituted the master their agent for the purpose of directing the destination of the cargo. This question came again under consideration in the case of the "*Panaghia Rhomba*" (12 Moo. P. C. C. 168). That ship, during the Crimean war, took in a cargo of wheat consigned to the Piræus, or Syra. She was subsequently captured for an attempt to violate the blockade of Odessa, and was condemned. The Court held that the owners of the cargo could not protect their property from condemnation merely by showing their own innocence in the transaction. It was laid down that when a blockade was known, or might have been known to the owners of the cargo, at the time when the shipment was made, and when therefore they might by possibility be privy to an intention of violating the blockade, such privy should be assumed as an irresistible inference of law, and it would not be competent to them to rebut it by evidence; and that in cases of blockade for the purpose of affecting the cargo with liability the master should be treated as the agent for the cargo as well as for the ship.

CONTRABAND.

THE "NEPTUNUS."

Temp. 1800.

[3 C. ROB. 108.]

Case.] In 1798, during war between Great Britain and Holland, the "Neptunus" was captured whilst on a voyage from Cronstadt to Amsterdam, on the ground of carrying contraband, and brought home for adjudication. Her cargo consisted of a quantity of tallow besides other articles. As to the tallow, the captors pressed for condemnation on the ground that it was to be considered as naval stores. A question was also raised as to the contraband character of some sail cloth.

Judgment.] The Court did not consider tallow as naval stores on a destination to Amsterdam, this being a mercantile as well as a naval port; but it was intimated that if it had been taken on a voyage to Brest, this being merely a naval port, there would have been little doubt as to its contraband character. The tallow was consequently restored. It was, however, held that sail cloth was universally contraband even on a destination to ports of mere mercantile naval equipment, and condemnation of that found on board was decreed.

The Neptunus, 3 C. Rob. 108.

Contraband at first signified those articles the importation of which into a country was publicly prohibited. It now denotes those articles which a neutral cannot carry into the country of a belligerent without incurring the risk of confiscation. What is contraband has always been a matter of uncertainty, the list of contraband articles having varied from time to time.

With regard to the views of the publicists, Grotius classes commodities under three heads; first, those useful for war only, which are always contraband; secondly, those useful for peace only, which are never contraband; and thirdly, those *ancipitis usus*, which are useful both in peace and war. Whether the last are contraband or not will

depend on circumstances (*f*). Ortolan lays down that arms and instruments of war are the only objects necessarily contraband. Raw material and merchandise fitted for peaceful as well as warlike use ought only to be treated as contraband under special circumstances. Provisions and other objects of first necessity should never be treated as contraband (*g*).

Contraband has sometimes been defined by declaration of the Great Maritime Powers. Thus, by the Declaration of the Powers who were parties to the First Armed Neutrality of 1780, contraband was limited to munitions of war and sulphur. But this can scarcely be regarded as a satisfactory exposition of International Law, as the doctrine was altogether repudiated by Great Britain. At a later period some of the parties to the convention added to the list of contraband articles. Thus in 1793, on the outbreak of war between Great Britain and France, the National Convention of France declared provisions liable to pre-emption. Denmark in the same year issued a proclamation of neutrality declaring horses and articles necessary for the construction and repair of vessels, with the exception of unwrought iron, beams, boards and planks of deal and fir, to be contraband. By the declaration of Powers constituting the Second Armed Neutrality, 1800, contraband was limited to cannons, mortars, firearms, pistols, bombs, grenades, bullets, balls, muskets, fireballs, matches, powder, saltpetre, sulphur, cuirasses, pikes, swords, belts, cartridge-boxes, saddles and bridles; but from these articles there was excepted the quantity necessary for the defence of the vessel and her crew. This list was not, however, to interfere with the particular stipulations of any prior treaties with belligerents. This enumeration of contraband articles was subsequently acquiesced in by Great Britain, and confirmed by treaty. By the Treaty of 1794, between Great Britain and the United States, naval stores were included among contraband objects; it being further provided, that when provisions and articles not generally contraband were seized, they should not be confiscated, but that the owner should be indemnified.

Reverting to purely judicial authority on the subject, it appears that in the case of the "*Maria*" (1 C. Rob. 340), a Swedish vessel, captured by the British, when laden with a cargo of pitch, tar, hemp, deals, and iron, Sir W. Scott laid down that the tar, pitch, and hemp going to the enemy were in their own nature liable to seizure (*h*). In the case of the "*Charlotte*" (5 C. Rob. 305), a Lubeck ship carrying a cargo of masts and spars, the property of a Russian

(*f*) Lib. VI. c. I. § 5.

(*g*) *Diplomatie de la Mer*, Vol. II. pp. 190 and 191.

(*h*) For a modification of this doc-

trine as to pitch and tar, see the case of the "*Sarah Christina*," p. 226. *infra*.

merchant, was captured when on a voyage from Riga to Nantes, and brought home for adjudication. Sir W. Scott stated in his judgment that masts would, unless protected by treaty, be considered as contraband, whether bound to a mercantile port only, or to a port of naval military equipment. It is suggested by Mr. Tudor on the authority of the "International" (cited *supra*, p. 179), that telegraph cables might now be considered as contraband (†).

THE "JONGE MARGARETHA."

Temp. 1799.

[TUDOR'S LEADING CASES, 981; 1 C. ROB. 189.]

Case.] In 1797, during war between Great Britain and France, the "Jonge Margaretha," a Papenberg ship, was captured by the British whilst carrying a cargo of Dutch cheeses from Amsterdam to Brest. There was at the time, in the port of Brest, a considerable French fleet preparing for a hostile expedition against Great Britain. It appeared that the cheeses were exactly such as were used in British war-ships, and that they were such as were exclusively used in French ships of war. Under these circumstances they were held to be contraband.

Judgment.] Sir W. Scott stated in his judgment, that the catalogue of contraband had varied very much owing to particular circumstances, the history of which had not accompanied the history of the decisions. In 1673 the King's Advocate declared corn, wine, and oil liable to be deemed contraband; in 1747, butter, salted cod, and salmon going to Rochelle were condemned, as were rice and salted herrings in 1748. The rule appeared to be that generally provisions were not contraband, but that they might become so under circumstances arising out of the particular situation of the war or the condition of the parties engaged in it. Amongst the cir-

(†) Leading Cases in Mercantile Law, 986.

cumstances tending to preserve provisions, one was that they were the growth of the country exporting them ; another was the fact of their existing in their native unmanufactured state ; but the most important distinction was whether or not they were going with a highly probable destination for military use.

The Jonge Margaretha, Tudor's Leading Cases, 981 ;
1 C. Rob. 189.

This decision was followed by the United States courts in the case of the "*Commercen*" (1 Wheaton, 382). In this case, a Swedish vessel, with a cargo of barley and oats, was captured by a United States cruiser during the war between the United States and Great Britain, whilst on a voyage from Limerick to Bilbao. The Court held that as the provisions were exported from the enemy's country, and as it appeared that they were destined for the use of the British forces in Spain, the voyage must be considered illegal, and, in addition to the confiscation of the cargo, loss of freight was decreed against the vessel. It was observed that provisions were not usually contraband, but that they might become so if intended for the use of the enemy's army or navy, or destined for any port of naval equipment. The Court added that provisions which were the growth of the enemy country, and destined for the use of its forces, were contraband, although bound for a neutral port.

Occasional contraband is a term applied by writers on International Law to those objects which are liable to be regarded as contraband under some circumstances, but not under others. The justice of the doctrine has been denounced, on the ground that it is unfair to neutrals ; that it gives the belligerent an option of declaring what he pleases to be contraband ; and that if mitigated, as it frequently is by pre-emption, it resembles the infliction of a half punishment for an offence not wholly proven. Most English writers, however, uphold the doctrine.

In the French Revolutionary Wars of 1793 and 1794, the British authorities claimed that by the Law of Nations all provisions might be treated as contraband whenever one of the means employed to reduce the enemy to reasonable terms of peace was to deprive him of supplies (*k*).

(*k*) A question of a similar nature arose during the recent struggle between France and China. On February 20th, 1885, the French Govern-

ment announced, through its representatives abroad, that it proposed to treat rice bound for the open Chinese ports as contraband of war. On the 24th,

The harshness of the rule making provisions, under certain circumstances, contraband, has been modified in practice by the doctrine of pre-emption. Sir William Scott, in the case of the "*Haabet*" (2 C. Rob. 179), gives an account of the origin of pre-emption, and the rules governing it, according to the practice of the English Prize Courts. The learned judge remarked that the right of taking possession of cargoes of provisions belonged generally to belligerent nations, the ancient practice of several maritime states of Europe having been to confiscate them entirely; a more lenient practice had prevailed in later times, of holding such cargoes subject only to a right of pre-emption, that is, to a right of purchase upon a reasonable compensation to the individual whose property was thus diverted; but no rule had established that such a practice should be regulated exactly upon the same terms of profit as would have followed the adventure if no such exercise of war had intervened; it was a reasonable indemnification and a fair profit only on the commodity that was due, reference being had to the original price actually paid by the exporter and the expenses which he had incurred.

The decision in the case of the "*Sarah Christina*" (1 C. Rob. 237), a Swedish vessel, captured whilst carrying a cargo of tar, pitch, iron,

however, it announced that it recognised the possibility of alleviating this measure, and would confine its prohibition to shipments of rice destined for the open ports north of Canton. M. Ferry, in his despatch on the subject, stated that the French Government had hitherto done everything it could to respect neutral interests, and had limited for months the area of hostilities; but that it had now received information that large quantities of rice were being forwarded to the northern ports of China, and that the stoppage of these would materially affect the Peking Government. He added that France could not afford to lose this opportunity, and that of the two alternative modes of effecting this end, one of which was to blockade Shanghai and the other open ports, and the second to declare rice contraband of war, he had chosen the latter as the least detrimental to the interests of neutrals. M. Ferry proceeded to urge that this course was justified both by precedent and analogy. The English Ambassador in China having refused to recognise this right, Lord Granville intervened and explained that the English Government would not resist the seizure of rice by physical

force, and that its legality must be determined by the French prize courts, subject to ulterior diplomatic action. The subject was ultimately on several occasions mentioned in the House of Commons. The only official declaration that the English Government would commit itself to, was that it had made the requisite protest against rice being treated generally as contraband irrespective of its ulterior destination, and that the matter must be decided in the first instance by the French prize courts. On March 30th, however, the Ferry cabinet resigned, and on April 7th the preliminaries of peace were settled between the two countries.

Apart from the question whether, in the face of the denial by the French Government that war really existed, the French cruisers were entitled to exercise belligerent rights over neutral commerce, it is very doubtful whether the circumstances were such as brought the French declaration within the limits of the rules generally recognised by the English prize courts. Much less was it in accordance with the doctrines laid down on this subject by most Continental jurists.

hoops, and bars, on a belligerent destination, discloses at once a modification of the ordinary liability of pitch and tar, and an affirmation of the doctrine of pre-emption in regard to such articles. In this case, Sir William Scott stated that pitch and tar were in a maritime war usually liable to condemnation, but that the practice of the Court usually allowed the carriage of these articles, where they were the produce of the claimant's country, subject to a right of pre-emption on the part of the belligerent; although, in order that the neutral might be entitled to this waiver of confiscation, perfect *bona fides* on his part was required.

According to the English practice, when the right of pre-emption is exercised, the goods are paid for at their mercantile value, together with a reasonable profit, usually calculated at 10 per cent. (l).

The importance of coal in modern maritime warfare has on several occasions given rise to a discussion as to its contraband character, and as to how far it must be withheld from either belligerent. In 1859 and 1870 it was declared by France not to be contraband. According to Calvo the greater number of secondary states have expressed themselves in a similar manner with reference to this. In 1870, during the Franco-Prussian War, Great Britain held that the character of coal depended upon its destination, and refused to permit vessels to sail with it to the French fleet in the North Sea. Germany remonstrated against Great Britain's allowing its export under any circumstances. According to Mr. Hall (m), the view adopted by the English authorities, on the subject, was correct. Coal being used for so many innocent purposes of daily life, the mere fact of its being sent to a belligerent port ought not to be held sufficient to condemn it; if on the other hand its destination were to a port of naval equipment, or if for some other reason it appeared probable that there was an intention to devote it to hostile use, it would under these circumstances become liable to condemnation.

THE "MARGARET."

Temp. 1810.

[1 ACTON, 333.]

Case.] The "Margaret," an American vessel, sailed in 1804, during war between Great Britain and France, from Baltimore, with a cargo of tar and gunpowder, for the Cape of

(l) Naval Prize Act, 1864, 27 & 28
Vict. c. 25, sect. 38.

(m) International Law, 2nd edition,
p. 618.

Good Hope. On her arrival at the Cape she disposed of part of her cargo, and then proceeded to the Isle of France (*mm*), where the remainder was disposed of. Thence she proceeded to Batavia in ballast, and, after several intermediate voyages, finally sailed with a cargo of sugar, coffee, pepper, and other goods for Baltimore. In the course of this voyage she was captured by a British cruiser and brought in for adjudication. Both on the outward and homeward voyages false papers appear to have been used.

Judgment.] On the case coming before the prize court, both ship and cargo were condemned. On appeal, the decree of condemnation was affirmed. Sir William Grant stated in his judgment that if a vessel carried contraband on the outward voyage, she was liable to condemnation on the homeward voyage, it being by no means necessary that the cargo should have been purchased with the proceeds of the contraband.

The Margaret, 1 Acton, 333.

In this case the Court had to deal with the circumstances under which the carriage of an outbound contraband cargo would involve the vessel, and an innocent cargo, on the homeward voyage.

Some writers contend that a ship engaged in carrying contraband is entitled to proceed on her voyage after delivering over to the belligerent all contraband on board, unless it is too extensive in quantity to permit of this being done; and in numerous instances treaties to this effect have been entered into. The more usual practice is to bring both ship and cargo before a prize court of the captor's country.

The ship is *primâ facie* entitled to release subject to the penalty of loss of time, freight and expenses. Carriage of contraband will, however, involve confiscation of the vessel where the ship and the contraband belong to the same individual; or where the owner of the ship has been privy to the carriage of the contraband; or where, as in the case of the "*Margaret*," false papers have been used. Confiscation of the ship has also sometimes been decreed where the contraband comprises three-fourths of the cargo, or where the articles are contraband under a treaty to which the ship's country is a party.

(*mm*) Now Mauritius.

With regard to cargo not contraband, this too is usually released unless it is the property of the owner of the contraband.

The liability to confiscation attaches from the moment of the ship's leaving port on a hostile destination and extends to the termination of the return voyage where false papers have been used.

SETON v. LOW.

Temp. 1799.

[1 JOHNSON (N.Y.) CAS. 1.]

Case.] A policy of insurance was effected by the plaintiffs with the defendants on "all kinds of lawful goods and merchandises" on board the "Hannah," bound on a voyage from New York to Havannah. The defendants were not informed of the nature of the cargo. The ship was captured, and part of the cargo condemned as contraband. The cargo was abandoned in favour of the defendants, and an action was instituted for recovery under the policy. It was contended on behalf of the defendants that the contraband goods were not "lawful" within the meaning of the policy, and that the assured should have disclosed the fact that part of the cargo was contraband.

Judgment.] Kent, J., held the goods to be lawful, laying down in judgment that, though the Law of Nations authorized the seizure of contraband articles by belligerent powers, yet a trade by a neutral in articles of contraband was a lawful one, although from necessity subject to inconvenience and loss. The other point was also decided in favour of the plaintiffs, for whom judgment was accordingly given.

Seton v. Low, 1 Johns. (N. Y.) Cas. 1.

It is in one sense perfectly lawful for a neutral to carry contraband to a belligerent port, or to endeavour to evade a blockade. At the same time a belligerent is at liberty to arrest the neutral ship in either case. The rights of neutrals and belligerents in these cases are co-existing rights; neither can charge the other with a criminal offence. In the case of *Ex parte Chavasse*, *In re Grazebrook* (34 L. J. N. S. Bank. 17), it appeared that Grazebrook, a merchant carrying on business at Liver-

pool, had arranged in 1862 with one Chavasse, for the purchase on their joint account of a large quantity of arms and ammunition to be consigned to a third party, resident in the Confederate States of North America, and sold on their joint account. In 1864 an application was made by the trustees of a deed of assignment executed by Chavasse for the benefit of his creditors, for an apportionment of the proceeds of this venture. The application was resisted on the ground that the contract was for the importation of contraband goods into the Confederate States, and therefore illegal. The judgment of Lord Westbury contains the following important dictum: "In the view of International Law, the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labour with the inhabitants of every other country. If hostilities occur between two nations, and they become belligerent, neither belligerent has a right to impose, or to require a neutral government to impose, any restrictions on the commerce of its subjects. The right which the law of war gives to a belligerent, does not produce the consequence that the act of a neutral, in transporting munitions of war to a belligerent country, is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint either against the neutral trader personally or against the Government of which he is a subject. The act of the neutral trader in transporting munitions to the belligerent country is quite lawful, and the act of the other belligerent in seizing and appropriating the contraband is equally lawful. All that International Law does is to subject the neutral merchant to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined." His lordship accordingly held that the contract was a lawful one, and that the ordinary rights of property resulted from it; and the decree of the Court below, dismissing the application, was reversed.

Similar principles have been applied to contracts involving an intended breach of blockade. In the case of the "*Helen*" (L. R. 1 A. & E. 1), the master of a ship sued for wages under an agreement entered into between himself and the owners. An article of the defendant's answer, alleging that the agreement was entered into for the purpose of running the blockade of the southern ports of the United States of America, or one of them, and was therefore contrary to law, was ordered to be struck out. Dr. Lushington stated in his judgment, that principle, authority and usage called upon him to reject the new doctrine, that to carry on trade with a blockaded port was, or ought to be, a municipal offence.

It is doubtful, however, whether the decision in the case of *Ex parte Chavasse*, would apply to contracts for the carriage of property in violation of the Rule of the War of 1756. (See *infra*, p. 237.)

THE "IMINA."*Temp.* 1800.

[3 C. ROB. 167.]

Case.] In 1798, during war between Great Britain and Holland, the "Imina" sailed on a voyage from Dantzic to Amsterdam with a cargo of ship timber, but in consequence of information of the blockade of Amsterdam she changed her course and was proceeding to Embden, a neutral port, when she was captured by a British vessel and brought home for adjudication.

Judgment.] Sir William Scott, in giving judgment, held that contraband, in order to be confiscable, must be taken in the actual prosecution of a voyage to an enemy's port; from the moment of quitting port on a hostile destination the offence was complete, and it was not necessary to wait till the goods were actually endeavouring to enter the enemy's port; but if, on the other hand, the goods were not taken *in delicto*, or in the actual prosecution of such a voyage, the penalty was not generally held to attach. In the present case, the voyage having been to a neutral port, restitution was decreed.

The Imina, 3 C. Rob. 167.

The principle deducible from this decision is that contraband is usually subject to confiscation only when taken on a voyage to an enemy port. Under ordinary circumstances, goods bound for a neutral port cannot be deemed contraband. To this general rule, however, there are several apparent exceptions. In the case of the "Commercen" (cited p. 225), it was held that provisions consigned to a neutral port, but destined for the use of the British forces in Spain, were of so contraband a character as not only to involve confiscation of the goods, but also to subject the neutral vessel to loss of freight. Moreover, under the doctrine of Continuous Voyages, as applied to contraband, the United States Courts have held that property of a contraband nature is liable to condemnation if there be a presumption of an ultimate hostile destination, even though the immediate destination be to a port in neutral territory(n).

(n) Case of the "Peterhoff," pp. 245, 246, *infra*.

ANALOGUES OF CONTRABAND.

THE "OROZEMBO."

Tamp. 1807.

[6 C. ROB. 430.]

Case.] During the war which prevailed between Great Britain and Holland at the beginning of the present century, an American ship was chartered by a merchant at Lisbon, ostensibly to proceed in ballast to Macao and thence to take a cargo to America. Afterwards, by direction of the charterer, three military officers of distinction and two persons employed in civil departments in the Government of Batavia, were received on board. There were other persons on the ship, making seventeen in all. The vessel was captured by a British cruiser, and application made for its condemnation. It was contended on behalf of the owners of the vessel, that in order to support the penalty of condemnation, some proof of delinquency in the master or the owner should be given.

Judgment.] Sir William Scott, in giving judgment, held that the fact of there being even three military officers on board was sufficient to involve the vessel in guilt. With regard to the civil officers, the learned judge remarked that he did not feel called upon to determine whether the same principle applied to them; but he added that it appeared to him only reasonable that, "wherever it was of sufficient importance to the enemy that such persons should be sent out on the public service at the public expense, it should afford equal ground of forfeiture against the vessel engaged in carrying them." As to the contention that to warrant condemnation there should be some proof of delinquency on the part of the master or owner, the learned judge held that such proof was not necessary, and that it was sufficient if any injury arose to the belligerent from the employment in which the vessel was found.

The Orozembo, 6 C. Rob. 430.

The doctrine of contraband has been extended by analogy to the carriage by a neutral of (1) naval and military persons ; (2) official despatches ; whilst (3), in the case of the "Trent," it was sought to extend it to the carriage of enemy's envoys.

From the above case it would seem that the carriage of naval or military officers belonging to the other belligerent involves the neutral in liability, even though he does not know of the service in which he is engaged, or even though he may have been impressed into the service against his will.

THE "ATALANTA."

Temp. 1808.

[6 C. Rob. 440.]

Case.] In 1807, during war between this country and France, a neutral ship was captured on a voyage from Batavia to Bremen. A tea-chest in a trunk belonging to one of the supercargos was found to contain despatches from the Governor of the Isle of France to the French authorities.

Judgment.] In view of this fact the vessel and all cargo belonging to the owners and to the supercargo were condemned, the Court laying down in its judgment, that the carriage of despatches between the colonies and the mother country of the enemy was a service highly injurious to the other belligerent, and an act of the most noxious and hostile kind.

The Atalanta, 6 C. Rob. 440.

Liability for transmission of despatches, however, seems to differ from the liability arising from the carriage of military persons, inasmuch as, in the former case, the neutral vessel is only liable if the neutral master or owner knew that the despatches were connected with belligerent objects. In the case of the "Rapid" (Edwards, 228), an American ship was captured, during the war between England and

Holland, on a voyage from New York to Tonningen. Among the papers given up by the master at the time of capture was a despatch addressed to the Dutch Colonial Minister at The Hague, under cover of a communication to a commercial house at Tonningen. On this ground an order for the confiscation of the ship was applied for. It appeared that the master of the ship, who was an American, had received the despatch among other letters from private persons, and was ignorant of its contents. Under these circumstances an order for confiscation was refused.

THE "MADISON."

Temp. 1810.

[EDWARDS, 224.]

Case.] During war between Great Britain on the one side and France and Denmark on the other, the "Madison," an American ship, was captured by a French privateer and carried into Dieppe, but subsequently liberated. After her liberation she was proceeding in ballast to Baltimore, when she was again captured, this time by a British cruiser. The compulsion under which she went into Dieppe, which was then blockaded, being sufficient to exempt her from the penalties of a breach of the blockade, the captors pressed for her condemnation on the ground that there was on board a despatch from the Danish Government to the Danish Consul-General at Philadelphia.

Judgment.] Sir William Scott in his judgment held that a communication from the Danish Government to its own consul in America did not necessarily imply anything that was of a nature hostile or injurious to British interests, and it was not to be so presumed. If such communications were interdicted the functions of such official persons would cease altogether. Restoration of the ship was accordingly decreed.

The Madison, Edwards, 224.

The carriage of despatches from a belligerent government to its diplomatic or consular agents in a neutral country is not an act of a hostile nature. One belligerent is not entitled to cut off communication between the neutral and the other belligerent. The carriage of mail-bags is also exempted under special treaties. By conventions between Great Britain and France it has also been agreed that packets owned by the State, vessels employed by the State for this purpose, and lines subsidised by the Governments, shall have the privileges of war-ships while in the ports of either country.

THE "TRENT."

Temp. 1862.

[PARLIAMENTARY PAPERS, 1862, VOL. LXII.]

Case.] The "Trent" was a British mail steamer. In November, 1861, she was on a voyage from Havannah to St. Thomas, with mails and passengers. Amongst the passengers were Messrs. Mason and Slidell, envoys from the Confederate States to Great Britain and France. When about nine miles from the coast of Cuba, she was stopped by the United States cruiser, the "San Jacinto." Lieutenant Fairfax, an officer of the "San Jacinto," then put off in a boat and boarded the "Trent." He demanded the surrender of Messrs. Mason and Slidell and their secretaries. After some parley, and in spite of the protest of the captain of the "Trent," Messrs. Mason and Slidell, with their secretaries, were transferred to the "San Jacinto," and subsequently imprisoned in a military fortress. Just so much force was used as was necessary to satisfy the parties concerned that resistance would be unavailing. The "Trent" was then allowed to proceed on her voyage. When these facts became known, the British Government demanded the restoration of the persons and an apology. In this demand Great Britain was supported by France, Austria, Prussia, Italy, and Russia.

Messrs. Mason and Slidell were eventually released ; but their release was accompanied by a long state-paper in which Mr. Seward contended :—(1.) That Messrs. Mason and Slidell, and their despatches, were liable to be regarded as contraband. In support of this contention, Mr. Seward relied on the following arguments :—That contraband in its original signification meant contrary to proclamation, prohibited ; that naval and military persons came within this definition ; that Vattel had laid down the principle, “ War allows us to cut off from an enemy all his resources, and to hinder him from sending ministers to solicit assistance ; ” that Sir William Scott, in the case of the “ *Caroline* ” (6 C. Rob. 468), had laid down that “ You may stop the ambassador of your enemy on his passage ; ” moreover, the same learned Judge, in the case of the “ *Orozembo*,” had held, that, when it was of importance to an enemy that ministers should be sent out on the public service at the public expense, the fact of carrying them afforded a ground of forfeiture against the vessel let out for a purpose so intimately connected with hostile operations.

(2.) That Captain Wilkes had a right to detain and search the “ *Trent*,” and the fact that the ship was proceeding from one neutral port to another was immaterial.

(3.) That the right of search was exercised in a lawful and proper manner.

(4.) That having found the contraband on board, he had a right to capture it.

Mr. Seward did not, however, attempt to justify the mode in which the right had been exercised, and expressed an opinion that the ship should have been brought into a United States port for adjudication.

To this despatch the British Government replied, pointing out that Messrs. Mason and Slidell and their despatches, could not be considered as contraband, and that neutral States had a perfect right to maintain friendly relations with both belligerents. The only distinction arising out of the peculiar circumstances of a civil war was that, in order to avoid the

question of the recognition of the independence of one of the belligerents, diplomatic agents were frequently substituted for ministers proper, with the powers and immunities of ministers, though not invested with representative character or entitled to diplomatic honours. Messrs. Mason and Slidell must have been sent in that character and would have been received, if at all, as such. The conveyance of those gentlemen and their despatches was, therefore, no breach of neutrality. Neither could they be regarded as contraband. The dictum of Sir W. Scott in the case of the "*Caroline*," had no reference to the case of an ambassador from a belligerent State while in a neutral ship. The case of the "*Orozembo*" was distinct from the present case, inasmuch as the former vessel was found to have been engaged as an enemy transport. The duties of Messrs. Mason and Slidell were not in any way connected with military operations. It was also contended that no authority could be found giving countenance to the proposition that persons or despatches, when in a neutral vessel on a voyage to a neutral port, could ever be seized as contraband of war (o).

The Trent, Parliamentary Papers, 1862, Vol. LXII., p. 607.

The two weak points in the American case, as stated by Mr. Seward, seem to be (1) the ignoring of the fact that Messrs. Mason and Slidell were bound to a neutral port, and (2) the ignoring of the right which every neutral has of maintaining communication with an acknowledged belligerent. It was the want of hostile destination, except in the most strained construction of the phrase, which distinguished this case from that of the carriage of ordinary contraband, or from such cases as that of the "*Orozembo*." On the other hand, the con-

(o) For a careful criticism of the argument in support of the United States' contention, the reader is referred to *Historicus' Letters on International Law*, pp. 187—198; and *Kent's International Law*, pp. 357—363.

tention that these envoys were public officers sent out at the public expense for the purpose of promoting hostile designs against the United States on the part of neutral governments, may be adequately met by the reply, that whilst a State remains neutral it has a right to discuss and consider any communications or propositions which may be made to it by any other State or recognized belligerent body.

RULE OF THE WAR OF 1756.

THE "IMMANUEL."

Temp. 1799.

[TUDOR'S LEADING CASES, 948 ; 2 C. ROB. 186.]

Case.] In 1799, during war between this country and France, the "Immanuel," a Hamburg ship, was captured by the English whilst on a voyage from Hamburg to St. Domingo, having on her voyage touched at Bordeaux, where she sold part of the goods brought from Hamburg and took other goods for St. Domingo. Condemnation of ship and cargo was sought by the captors on the ground that the vessel was in fact engaged in a trade between the enemy country and one of its colonies. Several questions were raised in the course of the case, one being as to whether the English had not themselves traded with St. Domingo ; another, as to whether, assuming certain contraband goods to have been discharged at Bordeaux, it would infect the subsequent carriage of other goods. The principal question, however, was whether neutral property engaged in a direct traffic between the enemy and his colonies was to be considered as liable to confiscation.

Judgment.] Sir William Scott laid down in his judgment that, on the breaking out of a war, it was the right of neutrals to carry on their accustomed trade with the exception of trade to blockaded places or in contraband articles, and subject to their

ships being liable to visitation and search. But very different was the case of a trade which the neutral had never possessed, which he held by no title of use and habit in time of peace, and which in fact he could obtain in war by no other title than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he set up his title. The learned judge expressed his opinion that the colonial trade, generally speaking, was of such a character as he had described. The colonial trade was one generally confined to the exclusive use of the mother country to which the colony belonged. It could not be considered to be a right of neutrals to intrude into a commerce which had been uniformly shut against them, and which was forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affected to open them to neutrals, it was not his will but his necessity that changed his system; that change was the direct and unavoidable consequence of the compulsion of war. In the present case it was a measure, not of French councils, but of British force. In view of these considerations the goods shipped at Bordeaux were condemned, the Judge intimating that until he was better instructed by the judgment of a superior tribunal he would continue to hold that he was not authorized to restore goods, although neutral property, passing in direct voyages between the mother country of the enemy and its colonies. As to the ship, it belonged to the same proprietors as the cargo, and if the goods had been contraband the ship would have been liable to confiscation, but inasmuch as it was a case where a neutral might more easily misapprehend the extent of his own rights, and as it was also a case of less simplicity, in which he acted without the notice afforded by former decisions on the subject, restitution of the ship was decreed, but without freight or expenses. The goods taken in at Hamburg were also restored.

The Immanuel, Tudor's Leading Cases, 948; 2 C. Rob. 186.

This case turns on the Rule of the War of 1756. The rule is really older, but received its most explicit enunciation about that time. Its purport is that where a colonial or coasting trade is prohibited to other nations in time of peace, but thrown open in time of war, a neutral, by engaging in this trade, renders himself liable to the other belligerent. This liability, which usually extends both to ship and cargo, rests on two grounds: (1) the opening up of such a trade by one belligerent must be presumed to be due to pressure of the war and the neutral by engaging in it interferes in the war to the prejudice of the other belligerent; (2) the neutral, by engaging in a trade hitherto confined to subjects, virtually incorporates himself in the mercantile marine of the enemy.

In the war referred to, the French fleet had been driven from the seas by the English. The French were thus unable to maintain communication with their colonies. In this emergency, they invited the Dutch to carry on their colonial trade for them, though this was at other times confined to French subjects. The English, however, applying the principle above referred to, subjected Dutch vessels engaged in this trade to condemnation. The case of *Berens v. Rucker* (1 W. Black. 314), which was decided about 1758, contains a dictum of Lord Mansfield to the effect that if a neutral vessel traded to a French colony with all the privileges of a French vessel, it must be deemed to have been adopted and naturalized, and hence to be liable to capture as a French vessel.

The rule was revived in the war of 1793, and enforced during the long series of wars arising out of the French Revolution. It received a considerable extension, owing to the doctrine of Continuous Voyages (referred to below). It can, however, scarcely be considered a settled rule of International Law; its importance has also been much diminished by the fact that, amongst the principal maritime nations, the coasting and colonial trade have generally been opened up to foreigners. It is, however, stated by Mr. Arnould, in his work on *Marine Insurance*, that "An insurance effected in this country, being at the time a belligerent power, to protect neutral trading of this exceptional character, would be treated as wholly illegal and void by our courts, on the ground that trading to an enemy's colony, with all the privileges of an enemy's ship, causes a neutral vessel to be regarded as an enemy's ship, and renders her lawful prize (*p*)."^(p) But apparently this view is open to some doubt (*q*).

During the Crimean War the rule appears to have been superseded by the Order in Council of the 15th of April, 1854, whereby it was

(*p*) P. 701.

(*q*) See Tudor's *Leading Cases in Mercantile Law*, 972—980; also dictum of

Lord Westbury in *Ex parte Charasse*, 34 L. J. N. S. Bank. 17.

declared that "the subjects or citizens of any neutral or friendly State shall and may, during the present hostilities with Russia, freely trade with all ports and places wheresoever situate, which shall not be in a state of blockade."

DOCTRINE OF CONTINUOUS VOYAGES.

THE "WILLIAM."

Temp. 1806.

[5 C. ROB. 385.]

Case.] During war between Great Britain and Spain, the "William," a neutral ship, sailed from La Guira, a Spanish colony, with a cargo of cocoa to Marblehead in the United States. She arrived at Marblehead on the 29th May, 1800; the cargo was landed and entered at the custom house and a bond was given for the payment of duties. The ship was then again laden with the chief part of the former cargo and some sugar, and sailed on or before the 7th of June for Bilboa in Spain. The ship was taken by the British, and such part of the cargo as had been brought from La Guira was condemned.

Judgment.] It was held by the Court of Appeal that the mere touching at a neutral port, together with payment of dues there, was not sufficient to establish a *bond fide* importation into America, that the voyage was practically a continuous one from La Guira to Bilboa, and therefore in violation of the Rule of the War of 1756.

The William, 5 C. Rob. 385.

This case illustrates the doctrine of Continuous Voyages as applied in connection with the Rule of the War of 1756. Neutrals sought to evade this rule by touching on their voyages from the colony to

the mother country at a neutral port, and there landing cargo and paying dues. It was held by the English courts that if there was an intent to carry goods from the colony to the mother country, the proceedings at a neutral port, if merely colourable, would not avail, that in such case the voyage would be regarded as a continuous one artfully interrupted, and the penalty would take effect. In the case of the "Essex" (referred to by Sir W. Scott, in the case of the "Maria" (5 C. Rob. 369), as the leading case on the subject), an American vessel took on board a cargo of Spanish produce at Barcelona, with instructions from the European agent, "that she should go to the Havannah, first touching at Salem, in America, where the owner resided;" this plan was subsequently acquiesced in by the owner. In spite of the fact that Salem was a neutral port, the Court held both ship and cargo liable to condemnation, on the ground that there was an original intention to proceed to Havannah, and that the voyage was in reality a continuous one from Spain to a Spanish colony.

If the neutral, on the other hand, could prove a *bond fide* importation into the neutral country, then the subsequent voyage from a neutral port to the belligerent country was not regarded as involving the vessel in any liability. In the case of the "Maria" (5 C. Rob. 365), an American ship was captured by a British cruiser during war, and brought in for adjudication on the ground of having engaged in the enemy's colonial trade. It appeared that the "Maria" had sailed from Havannah to New Providence with a cargo of colonial produce. At the latter port she was refitted, and after taking on board part of the same cargo, but with other goods belonging to the same owner, she sailed for Amsterdam. Inasmuch as there was no evidence of original intention to carry from Havannah to Amsterdam, and as the cargo for Amsterdam was not entirely the same as that brought from Havannah to New Providence, Sir Wm. Scott allowed the owner of the cargo to adduce proof of his original intention to sell them in America. This being done, it was held that the voyage was not a continuous one, and restitution was decreed. Some stress was laid upon the fact that, in this case, the voyage, though to an enemy port, was not to the mother country of the colony; and also on the fact of part of the cargo only having been carried on. Sir W. Scott, whilst attributing due weight to those facts as indications of intention, yet intimated that he had no disposition to relax the general test of a *bond fide* intent to sell at the neutral port.

THE "STEPHEN HART."

Temp. 1863.

[BLATCHFORD'S PRIZE CASES, 387.]

Case.] During the American Civil War the "Stephen Hart," a British vessel, whilst on a voyage from London to Cardenas, a neutral port, with a cargo consisting wholly of contraband, was captured by a United States war vessel, and brought in for adjudication, on the ground that the cargo was intended to be delivered to the enemy either directly in the vessel itself, or by being transhipped at Cardenas, and thence carried on by another vessel.

Judgment.] Betts, J., in giving judgment, laid down that the decision did not depend upon the question whether the ship was documented for and sailing upon a voyage from London to Cardenas, but upon the destination and intended use of the cargo. The unlawful character of the carriage of contraband was not determined by deciding whether its immediate destination was to a port of the enemy; if contraband goods were destined for the direct use of the enemy's army or navy, the transportation would be illegal. The proper test was whether or not the goods were intended for sale or consumption in the neutral market. If the contraband cargo was destined when it left England for the use of the enemy, no principle of the Law of Nations, and no consideration of the rights of neutral commerce, could require that the mere touching at a neutral port either for the purpose of making it a new port of departure, or for the purpose of transshipment, should exempt the vessel or cargo from capture. After reviewing the facts of the case the learned Judge condemned the vessel and cargo as lawful prize.

The Stephen Hart, Blatchford's Prize Cases, 387.

The doctrine of Continuous Voyages was during the American Civil War applied by the United States Courts to cases of neutral vessels.

carrying contraband or seeking to break blockade. During this war many vessels sailed to Nassau, an English port in Providence Island, adjacent to the coast of the Southern States, which was under blockade, or to some other neutral port near at hand. They then made a new start, or unloaded their cargo, which was carried on by other vessels. It was thus sought to secure immunity during the voyage from the port of shipment to the neutral port. The United States Courts held, however, that if there was any intent that the goods should be carried on by the same or other vessels the penalty would take effect. The limits of this extension may be gathered from the cases of the "Springbok" and "Peterhoff," cited below.

THE "SPRINGBOK."

Temp. 1863.

[BLATCHFORD'S PRIZE CASES, 434 ; 5 WALLACE, 1.]

Case.] During the American Civil War, the "Springbok," an English vessel, was on a voyage from London to Nassau with a cargo of goods, all belonging to one owner, some of them of a contraband character and others not, when she was captured by a United States steamer, and brought in for adjudication. It appeared from the evidence that at the time of the departure from England it was intended that the cargo should be transhipped at Nassau, and carried on by another vessel to the Confederate States in violation of the blockade established by the Federals.

Judgments.] The lower Court on this ground condemned both ship and cargo, contraband and noncontraband. On appeal the Court confined the decree of condemnation to the cargo only, on the ground that there was not sufficient proof of knowledge on the part of the owners of the ship that the cargo was really destined to be carried on to a blockaded port.

The Springbok, Blatchford's Prize Cases, 434 ;
5 Wallace, 1.

This case is cited as illustrating the respective liability of ship and cargo under the doctrine of Continuous Voyages as applied to the breach of blockade and the carriage of contraband. The rules as to liability in this case cannot be regarded as definitely settled. But it may be presumed that the liability to confiscation will be held to rest on grounds similar to those applicable where no middle port is interposed. (See *supra*, pp. 225, 231.)

THE "PETERHOFF."

Temp. 1863.

[BLATCHFORD'S PRIZE CASES, 463 ; 5 WALLACE, 28.]

Case.] During the American Civil War, the "Peterhoff," a British vessel, was captured by a United States cruiser when on a voyage from London to Matamoras, a neutral port on the Mexican side of the Rio Grande. The cargo consisted of goods partly contraband. Condemnation was asked for by the captors on the ground that the goods were to be carried in lighters up the river, and then transported into the territory of the Confederate States.

Judgments.] Betts, J., in giving judgment, laid down that if the voyage of the ship was an honest one from one neutral port to another, and she was carrying neutral goods between those ports only, she was not liable to capture ; but if her voyage was a simulated one and she was carrying contraband really destined for the use of the enemy, and to be introduced into the enemy's country by transshipment from her at the mouth of the Rio Grande into other vessels, she and her cargo were liable to seizure and condemnation. After reviewing the facts of the case he pronounced both ship and cargo liable to confiscation.

An appeal was taken to the Supreme Court. Chase, C. J., in delivering the opinion of that Court, held that the voyage of the ship was not simulated. He then proceeded to deal with a contention of the captors that the ulterior

destination of the cargo was in breach of the blockade of the Rio Grande. As to this, he held that the mouth of the river was not included as suggested in the blockade of the ports of the rebel States. The next questions considered was whether an ulterior destination to the rebel region affected the cargo with liability to condemnation. After an examination of those authorities on the subject, which recognised the lawfulness of neutral trade to or from a blockaded district by inland navigation or transportation, he held that the trade from London to Matamoras even with the intent to supply goods to Texas could not be deemed a violation of the blockade, and could not be declared unlawful. On these grounds it was held that the ship and cargo were free from liability for breach of blockade.

On the further question, as to the liability of that part of the cargo which consisted of contraband, the learned Chief Justice laid down that, although articles not contraband might be sent to Matamoras and thence to the rebel regions where the communications were not interrupted by blockade, yet contraband goods destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture, although primarily destined to Matamoras. That portion therefore of the cargo which was held to be contraband was condemned, as was also so much of the rest of the cargo as belonged to the same owners. The ship was restored, subject to the payment by the owners of costs and expenses.

The Peterhoff, Blatchford's Prize Cases, 463 ;
5 Wallace, 28.

The result of the decision in the "*Peterhoff*" is to render goods in the nature of contraband liable, even though destined for a neutral port, if there is any ground on which to found a presumption that they are subsequently to be transported across neutral territory into that of the other belligerent. It would seem from the case of *Hobbs v. Henning* (34 L. J. C. P. N. S. 117) that this principle has not been adopted by the English Courts. In this case an

action was brought on a policy of insurance on goods on board the "Peterhoff." The defendant set up a plea to the effect that the goods were contraband of war, and were shipped for the purpose of being imported into a port of the Confederate States then at war with the United States, and were liable to be seized by United States cruisers as contraband of war. To this plea the plaintiff demurred. It was held that the plea showed no defence to the action. Erle, C. J., in giving judgment, after showing that the plea was deficient in point of form, went on to consider the question of liability of contraband goods under the circumstances in question. As to this he held that contraband goods passing between neutrals were not liable to seizure unless it distinctly appeared that the voyage was to an enemy's port.

*VISIT AND SEARCH.—CONVOY.***THE "MARIA."***Temp.* 1799.

[1 C. ROB. 340.]

Case.] The "Maria" was a Swedish vessel having on board a cargo of pitch, tar, hemp, deals, and iron. The vessel was with others under the convoy of a Swedish frigate. War prevailed at the time between France and Great Britain. A British squadron having proposed to exercise the right of search over the vessels under convoy, the Swedish warship intervened and refused to allow this, whereupon the whole convoy was captured by the British, and the "Maria" and other vessels composing it, were brought in for adjudication.

Judgment.] Sir William Scott, in his judgment, laid down that the right of visit and search in regard to merchant ships was an incontestable right of a belligerent, and that this right could not be varied by the authority of the neutral State being interposed. Two Sovereigns might agree that the presence of an armed vessel with their merchant ships should be mutually understood to imply that nothing was to be found in

the convoy, inconsistent with amity or neutrality; but no Sovereign could compel the acceptance of such security by force. The only security which the belligerent possessed independently of such special agreement was the right of visitation and search. The penalty for the contravention of the right was confiscation of the property withheld from its exercise. No special circumstances existed in the opinion of the Court to take the case out of the ordinary rule, and the ship and cargo were condemned.

The Maria, 1 C. Rob. 340.

During war between two States, other States have a right to carry on commerce as usual subject to certain exceptions. These are the carriage of contraband, evasion of blockade, violation of the Rule of the War of 1756, and formerly the carriage of enemy goods. In order to enable them to ascertain that the excepted traffic is not engaged in, belligerents are endowed with the right of visit and search. This involves a right on the part of a public vessel belonging to either belligerent, to stop a neutral merchant vessel on the high seas, and examine her papers and even her cargo. This right can only be exercised over merchant vessels, and must be exercised only so as to attain the object sought after; any unnecessary violence or delay will be a ground for compensation. But subject to this the neutral is bound to submit.

At times it has been arranged by treaty between belligerents and neutrals, that the presence of a neutral warship among a fleet of traders should procure for the latter exemption from visit and search. This is what is known as the right of convoy. It was later sought to enforce this right without treaty. Great Britain refused to admit this pretension, and in the case of the Swedish convoy subjected the whole fleet to confiscation for resisting visit and search.

In 1800, during war between Great Britain and France, Denmark being at that time neutral, an English vessel proposed to exercise the right of search over six merchantmen under convoy of the the Danish frigate "*Freya*." The exercise of the right was resisted by the latter vessel on the ground of the ships being under convoy. Hostilities ensued, and the "*Freya*" was captured. No treaty on the subject existed between the two countries, and an open rupture appeared imminent. In the event, after some negotiation, the "*Freya*" was released by the British authorities, Denmark on her part undertaking by convention not to insist on the right of convoy until some

definite arrangement on the subject was made (r). The matter as between Great Britain and Denmark was subsequently regulated by the Convention of June, 1801, to which Denmark acceded, as mentioned below.

Meanwhile several other States had leagued together with the object of forcing on Great Britain certain milder principles of International Law in regard to the exercise of belligerent rights over neutral commerce, amongst which was the right of convoy. By the second Armed Neutrality of 1800 between Russia, Denmark, Sweden, and Prussia, it was agreed that a declaration by officers in charge of a convoy, to the effect that vessels under convoy had no contraband on board, should exclude the right of visitation and search. This declaration can scarcely be regarded as an enunciation of existing International Law. The matter was, however, settled, as between Great Britain and Russia, by the Convention of June, 1801. By that convention, to which the other Northern Powers subsequently acceded, it was provided:— (1.) That the right of search should only be exercised by war ships, and should not be extended to privateers; (2.) That the owners of merchantmen should produce to the commander of the convoy passports and certificates before being allowed to sail under convoy; (3.) That the convoy and merchant ships should keep out of cannon shot if possible, and that for the purpose of making a search a boat should be sent by the belligerent to the convoy; (4.) That no search should be made if the papers were in form, and there was no good motive for suspicion; in the contrary case the commander of the convoy was to detain the merchantman for sufficient time to allow of search, which was to be made in the presence of officers selected by the commanders of both war ships; (5.) If there appeared sufficient reason for making further search, notification of the intention to do so was to be made to the commander of the convoy, the latter having the right to appoint an officer and to remain on board and assist at the examination; the merchant ship in such case was to be taken as soon as possible to the nearest and most convenient port of the belligerent, and the search was to be made with all possible dispatch; (6.) If a merchantman under convoy should be detained without sufficient cause, the commander of the visiting ship should not only be bound to make compensation, but should suffer further punishment for every act of violence committed; on the other hand, a convoying ship should not be allowed to resist by force the detention of a merchantman.

But independently of treaty, a merchant ship is still not entitled,

(r) Ortolan *Diplomatie de la Mer*, Vol. II., *Annexe E*.

according to the rule of the English prize courts, to claim exemption from the belligerent right of visit and search on the ground of being under convoy. By the municipal regulations of France, Germany, Austria, Italy, and the Baltic powers, however, it is provided that on a declaration being made by an officer of the convoying vessels, all merchant vessels under convoy shall be exempt from visit and search.

The cases in which the right of visit and search may be exercised in time of peace are (1) on suspicion of piracy; (2) on suspicion of breaking revenue laws; (3) on suspicion of aiding rebels. (See the "Virginus," cited p. 89, *supra* (s).)

THE "FANNY."

Temp. 1814.

[1 DODA, 443.]

Case.] In this case the principle of immunity of neutral property on board an armed vessel of the enemy came under the consideration of the English prize courts. During war between Great Britain and the United States, a British armed ship sailed under convoy with a cargo from Liverpool to Rio de Janeiro. The master there increased his crew, for the purpose of fighting his way home without convoy, which he had obtained permission to do. The ship was also furnished with a letter of marque. On her return journey, in April, 1814, with a cargo consisting partly of Portuguese property, she was captured by a United States cruiser after a severe fight, but was subsequently recaptured. Salvage was claimed by the re-captors in respect of the Portuguese property on the ground that the property would have been liable to condemnation by the United States Courts, as having been found on board an armed vessel of the enemy. This claim was resisted by the owners, who contended that neutral property was not generally liable to salvage, and that the onus of making out the

(s) As to the formalities to be observed in case of visit and search, see Hall's *International Law*, 2nd edition, pp. 681—684.

exception to the general rule was on the party setting up the claim.

Judgment.] The case came before Sir William Scott, who in giving judgment remarked, that the ship was manifestly a vessel of war. A neutral subject might put his goods on board a merchant vessel belonging to one belligerent, without giving the other belligerent a right to condemn the property. But if the neutral put his goods on board an armed vessel, he betrayed an intention to resist visitation and search, and so far as he did this he adhered to the belligerent. The learned Judge went on to say that, if a neutral acted in association with a hostile force, and relied upon that force for protection, he became *pro hac vice* an enemy. He could not entertain a doubt that the Americans might have upon just and sound principles condemned the property. The usual salvage to the re-captors was accordingly decreed.

The Fanny, 1 Dods. 443.

The principle illustrated in the above case is that though neutral property is not generally liable to be seized by a belligerent on a hostile ship (t), yet if the latter is armed, the property becomes liable, in the view of English courts, on the ground of a presumed intention to resist visit and search. Sir Wm. Scott's opinion on this subject is not borne out by United States decisions. In the case of the "*Nereide*" (9 Cranch, 388), the Supreme Court of the United States held, under somewhat similar circumstances, that a neutral might lawfully employ a belligerent armed vessel to transport his goods, and that such goods did not lose their neutral character by reason of the armament, nor by the resistance, provided the neutral himself did not take part in the armament or the resistance. It was added that the case would be the same even though he chartered the whole vessel and was on board at the time of resistance. Story, J., however, in a dissenting judgment, held that the act of sailing under a belligerent or neutral convoy was of itself a violation of neutrality, that the ship and cargo if caught *in delicto* were justly confiscable, and that if resistance were necessary to complete the offence the resistance of the convoy was the resistance of the associated fleet.

(t) Except, of course, in the event of its being contraband or engaged in an attempt to violate blockade.

DISPUTE BETWEEN DENMARK AND THE UNITED STATES.

Temp. 1810.

[WHEATON'S INTERNATIONAL LAW BY LAWRENCE, 858.]

Case.] In 1810, during war between Great Britain and Denmark, several United States vessels employed in the carriage of naval stores between American and Russian ports placed themselves under the convoy of British men-of-war for protection during the voyage across the Atlantic. The Danish Government thereupon issued an ordinance declaring all neutral vessels placing themselves under hostile convoy to be subject to condemnation. Several United States ships were captured on the return voyage, in accordance with the ordinance.

Remonstrances were thereupon addressed by the United States authorities to the Danish Government. According to the United States' contention a neutral might use any means short of fraud or force in order to escape from visit and search ; the fact of putting himself under convoy was an open act and therefore not a fraudulent one ; in order to implicate the neutral in the matter it was necessary that there should be actual resistance. To this Denmark replied, that the mere fact of manifesting a settled intention to resist was equivalent to actually resisting ; that one who put himself under protection of an enemy's convoy ranged himself on the side of the protector, and thus put himself in opposition to the enemy of the protector ; that by such action he evidently renounced any advantage which attached to the character of a friend to him against whom he sought protection.

Ultimately, after negotiations lasting over twenty years, pecuniary compensation was made by the Danish Government ; thus apparently lending a sanction to the principle contended for by the United States.

Dispute between Denmark and the United States, 1810 ;

Wheaton's International Law by Lawrence, 858.

*ANGARY.***SINKING OF ENGLISH VESSELS.***Temp. 1871.*

[ANNUAL REGISTER, 1871 ; PUBLIC DOCUMENTS, 255—259 ; PARLIAMENTARY PAPERS, 1871, VOL. LXXI.]

Case.] During the Franco-Prussian War of 1870, six British vessels lying in the Seine, near Duclair, were seized and sunk in the river by the Prussian troops, with the view of blocking up the channel and preventing French gunboats from interfering with the German military operations.

Some protest was made by the English Government, but the seizure was justified by Prince (then Count) Bismarck on the ground of necessity, which even in time of peace might render the employment or destruction of foreign property admissible under the reservation of an indemnification. After some correspondence a sum of money equivalent to about £7,000 was offered and agreed to be accepted as compensation. This indemnity included—(1.) The value of the ships and 25 per cent. in addition, the seizure being considered in the light of a forced sale ; (2.) The highest value of the cargoes, at the place of shipment, and at the time of capture, less port dues and charges for unloading, which had not been paid ; (3.) Small sums incurred for protests and counter certificates ; (4.) Five per cent. interest on the sums so ascertained.

A claim was also made by the master and seamen for loss of employment and effects, but the British Government refused to put forward any claim on this ground.

Another claim was made for charges incurred by the British Government in transmitting the seamen to their homes. This was admitted by both sides as fair.

Sinking of English Vessels, Annual Register, 1871 ;
Public Documents, 255—259 ; Parliamentary
Papers, 1871, vol. 71.

The *jus angariae* in its present application, consists in the right of a belligerent to seize the property of a neutral found in the territory of the other belligerent, and to make use of it for the purpose of warlike operations, subject to his paying compensation for the use or for any injury sustained. In the same war, the Germans also seized in Alsace, between six and seven hundred railway carriages, the property of the Central Swiss Railway, and also some Austrian rolling stock, detaining them for military use throughout a considerable period of the war.

APPENDIX.

SOME INTERNATIONAL DISPUTES AND MODES ADOPTED FOR THEIR SETTLEMENT.

THE BRITISH AMERICAN FISHERIES QUESTION.

[BRITISH AND FOREIGN STATE PAPERS. VOL. VII; PARLIAMENTARY PAPERS, 1855, VOL. LV.; 1874, VOLS. LXXIV. AND LXXV.; 1878, VOL. LXXX.]

By the Treaty of 1783 upon the recognition of the Independence of the United States, Great Britain conceded to the inhabitants of the United States the right to take fish of every kind on the Grand Bank and other banks of Newfoundland, in the Gulf of St. Lawrence, and in all other places where the subjects of Great Britain were wont to fish before the separation of the two countries; but this was not to extend to the right to land for the purpose of drying or curing fish. The right to fish was further extended to the coasts, bays, and creeks of all other British possessions in America; and within those limits was granted the right to dry and cure fish in any unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same should remain unsettled.

After the war of 1812, a dispute arose as to whether the privileges accorded by this treaty had been abrogated by the war. It was contended on behalf of the United States that the effect of the treaty was not to convey new rights or privileges, but to acknowledge and confirm those existing rights of fishing which had been enjoyed by the subjects of the United States before the separation of the two countries; moreover, that these were real rights, and consequently unaffected by any subsequent outbreak of war. In the latter characteristic the acknowledgment of such rights was said to be similar to the acknowledgment of the Independence of the United States. The United States plenipotentiaries stated that from the nature of the rights and the peculiar character of the Treaty of 1783, no further stipulation had been deemed necessary by the United States Government to entitle them to enjoyment of the rights.

Great Britain, on the other hand, asserted that the claim of one State to occupy any part of the territory, or fish in the territorial waters of another, could only rest upon convention. Neither could she assent to the proposition that such a treaty could not be abrogated by a subsequent war. There was no exception to the rule that all treaties were put an end to by a subsequent war between the same parties. Great Britain would not, therefore, give her diplomatic relations with one State a different degree of permanency from that governing her relations with other States. Moreover, the rights given by the treaty had all the features of temporary concessions. It did not follow from the fact of some parts of a treaty being irrevocable that the whole of the treaty was so.

Some further correspondence passed between the two Governments on the subject, and ultimately Lord Castlereagh stated to Mr. Adams that the orders given to the British Commissioners to interfere with the exercise of the rights by the United States citizens would be suspended, in order that a treaty might be arranged. In the result, a convention was entered into between the two countries on the 20th October, 1818, to the following effect :—(1.) That the inhabitants of the United States should have for ever, in common with British subjects, the liberty to take fish of every kind, on those parts of the coast specified in the treaty; (2.) That United States fishermen should have liberty for ever to cure fish, on the unsettled bays of certain parts of the coast of Newfoundland and of the coast of Labrador, but so soon as the same should be settled it should not be lawful for them to cure fish on such parts without previous agreement; (3.) The United States renounced the right of fishing on other parts of the coast of British North America, but American fishermen were to be admitted to the bays of those parts for the purpose of shelter, repairing damages, purchasing wood, and obtaining water, though under such restrictions as might be necessary to prevent their abusing the privileges reserved to them.

In 1849, in consequence of a petition presented to the Crown by the Canadian Parliament, a series of negotiations was commenced between Great Britain and the United States, with the view of granting to the citizens of the United States access to the fisheries of all the colonies (except Newfoundland) in return for reciprocity of trade with the United States in all natural productions. Ultimately, on the 5th of June, 1854, a new treaty was entered into between the two Governments, whereby it was provided :—(1.) That the inhabitants of the United States should have the right of taking fish of every kind except shell fish off the coasts of Canada, New Brunswick, Nova Scotia, Prince Edward's Island and the islands adjacent thereto, and also the right of landing on the shores of

those colonies and of the Magdalen Islands, for the purpose of drying their nets and curing fish, provided that they did not interfere with rights of private property or with British fishermen; (2.) But such rights of fishery were not to extend to salmon or shad fisheries or any river fisheries; (3.) In case of dispute the matter was to be settled by arbitration as provided in the treaty; (4.) British subjects were to have the right to take fish of every kind except shell fish on certain parts of the eastern coast of the United States, with permission to land for the purpose of drying their nets and curing fish, provided that they did not interfere with rights of private property or with United States fishermen; (5.) Salmon and shad fisheries and all river fisheries were similarly excepted from the privileges granted to British subjects. Provision was made for the appointment of commissioners to examine the coasts of North America, and designate the places reserved from the common right of fishing.

In 1870 a question arose with reference to the extent of the rights of fishery possessed by the two nations. The subject was dealt with anew by the Treaty of Washington of the 8th of May, 1871. This treaty provided:—(1.) That United States citizens should have the right to take fish of every kind except shell fish off the coasts of Quebec, Nova Scotia, New Brunswick, and Prince Edward's Island, and the islands adjacent thereto, without restriction as to distance from the shore, with permission to land there and also upon the Magdalen Islands for the purpose of drying their nets and curing their fish, provided they did not interfere with the rights of private property, or with British fishermen using the coasts for the same purpose; (2.) Similar privileges were given to British subjects on the east coast of the United States north of 39° N.L., and the islands adjacent thereto; (3.) These privileges were to last for ten years, and also for a further period of two years after notice to terminate by either party; (4.) Inasmuch as the privileges accorded to the United States were alleged by Great Britain to be greater than those accorded to her, provision was made for settling by arbitration the amount of compensation, if any, to be paid to Great Britain in respect of this alleged inadequacy of consideration.

Commissioners were appointed in pursuance of the treaty, and met at Halifax in Nova Scotia. Their meetings extended from the 15th of June to the 23rd of November, 1877. The sum of \$5,500,000 was awarded by them to Great Britain as compensation.

In 1878, a claim was made by the United States against Great Britain, in consequence of the Colonial fishermen having interfered with United States citizens in the exercise of their rights of fishing under the Treaty of Washington. It appeared that the United States fishermen had contravened certain local laws, made

subsequently to the treaty, forbidding herring fishery between the 20th of October and the 25th of April, and also forbidding the use of nets for barring, and fishing on Sundays. A very long correspondence took place on the subject, and ultimately £15,000 was paid by Great Britain as compensation; Great Britain, at the same time, protested against the right of the United States fishermen to fish in contravention of the local laws.

The British American Fisheries Question, British and Foreign State Papers, Vol. VII.; Parliamentary Papers, 1855, Vol. LV.; 1874, Vols. LXXIV. and LXXV.; and 1878, Vol. LXXX.

THE MOSQUITO PROTECTORATE QUESTION.

[PARLIAMENTARY PAPERS, 1856, VOL. LX.; 1860, VOL. LXVIII.]

The Mosquito Territory, a portion of Central America lying between Honduras, Nicaragua, and Costa Rica, had long been under the protectorate of Great Britain. Some attempts were made to found colonies and settlements, but from various causes the British colonists were compelled to withdraw. After the overthrow of the Spanish power in Central America, various native States grew up, and in 1840 a series of internal struggles broke out within the territory, which ultimately led to British interference. On the 1st of January, 1848, a British force hauled down the Nicaraguan flag from San Juan, and raised the Mosquito flag in its place. Apprehension was then expressed on the part of the United States lest Great Britain should monopolise for herself the control over the different routes between the Atlantic and Pacific Oceans.

Some correspondence took place between the two Governments, the result of which was that, in 1850, the Clayton Bulwer Treaty was entered into between Great Britain and the United States. By this Treaty each party agreed not to occupy, fortify, colonise, assume or exercise dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, or to make use of any protection or any alliance which either party enjoyed for the purpose of so doing (a).

Subsequently the United States requested the withdrawal of the British protectorate over the Mosquito Indians in accordance with the provisions of the treaty. To this request the British Govern-

(a) For an account of the other provisions of the Clayton-Bulwer Treaty relating to the construction of a water-

way across Central America, see p. 28, *supra*.

ment replied, pointing out that, up to the end of 1849, the United States Government had made no remonstrance to Great Britain on the subject of her protectorate of the Mosquito territory; that the treaty of 1850 only applied to future acquisitions, and was not meant to annihilate the existing protectorate, but simply to confine its powers and limit its influence, so as to prevent Great Britain from acquiring absolute control over the proposed Panama Canal; and finally, that the very words of the treaty in limiting the term of occupation showed that some occupation was in fact contemplated.

The United States replied, that on account of the savage and degraded state of the Mosquito Indians no protectorate proper could exist on the part of Great Britain in regard to them; that the nominal protectorate must involve an absolute submission on their part to the British Government; and therefore Great Britain must be treated as being in possession of the Mosquito Coast as undisputed owner; this being so, she was bound by the treaty to withdraw.

A very long correspondence ensued on the subject. Ultimately, on the 28th of November, 1859, a treaty was concluded between Great Britain and Honduras, whereby it was agreed that the country formerly occupied by the Mosquito Indians within the Honduras frontier, should be recognised as belonging to Honduras, and that the British protectorate over it should cease. Arrangements were also made for the appointment of commissioners to enquire into the claims of British subjects with reference to the matter.

By this means the question between Great Britain and the United States was for the time set at rest (b).

The Mosquito Protectorate Question, Parliamentary Papers, 1856, Vol. LX.; 1860, Vol. LXVIII.

THE MAINE BOUNDARY QUESTION.

[BRITISH AND FOREIGN STATE PAPERS, VOL. XXX., pp. 136—181.]

By the Treaty of 1783, between Great Britain and the United States, provision was made for the settlement of the boundaries between the State of Maine and the Province of New Brunswick. Difficulties subsequently arose in consequence of the reference in the treaty to certain highlands which had no definite existence. The

(b) For an account of the recent dispute and correspondence between the United States and Great Britain as to the effect of the Clayton-Bulwer Treaty on the proposed Panama Canal, see p. 29, *supra*.

King of Holland, to whom the matter was referred, stated that it was impossible to execute the provisions in the treaty relating to the subject. A boundary convention was subsequently made, but it was not ratified by the United States Senate. A discussion on the subject lasting over many years having proved ineffectual, in 1842 Lord Ashburton was sent out by the British Government, with the view of arranging a conventional line for the boundary between the two territories. According to the British Government, the principles to be observed in the settlement of such disputes were:—(1.) The establishment of a good boundary between the countries, but with an unobstructed communication and connection of the British colonies with each other; and (2.) That each nation should keep under its jurisdiction such inhabitants as had been so living for any length of time. The United States Government in stating their view of the matter urged that a boundary line could be fixed in accordance with the stipulations of the treaty of 1783. Eventually, after some correspondence, the boundary was arranged, and the result ratified by Treaty (c).

The Maine Boundary Question, British and Foreign State Papers, Vol. XXX., pp. 136—181.

THE OREGON CLAIMS.

[PARLIAMENTARY PAPERS, 1846, VOL. LII., 1873, VOL. LXXIV.]

In 1844, differences arose between Great Britain and the United States with reference to the Oregon territory. The latter Power claimed the district drained by the river Columbia, and the whole territory west of the Rocky Mountains as far as parallel 54° 40' N. In a dispatch, dated the 3rd September, the American Plenipotentiary stated that the United States' claims to the district were founded partly on pretensions put forward in their own proper right, and partly on pretensions derived from France and Spain. Their own proprietary claims against Great Britain were founded on priority of discovery, exploration, and settlement; their claim to discovery rested on that of Captain Gray, a United States citizen, who passed the bar and anchored in the river Columbia ten miles above its mouth

(c) The Maine Boundary Question has been inserted as containing an important statement of the principles which should be observed in the settlement of boundary disputes. It has been thought unnecessary to refer to the respective contentions of the two

countries as to the actual territorial limits in dispute, with which the correspondence on the subject is mainly taken up, but which would be unintelligible without the aid of a map of the locality.

on the 11th of May, 1792, and afterwards sailed farther up the river. As to the alleged previous discovery on the part of one Meares, a British subject, in 1788, it was asserted by the United States that Meares had expressly declared, in his account of the voyage, that there was no river as laid down in the Spanish chart. It was also alleged that Vancouver, who explored the coast in April, 1792, had failed to discover the river. With reference to priority of settlement, it was stated that establishments were formed there by American citizens as early as 1809 and 1810. In further support of their contention, the United States relied on the claims of France and Spain, to which the United States had succeeded under treaty. It was alleged that the river had been discovered as early as 1775, by a Spaniard called Heçeta, that the rights arising from prior discovery ought to extend to the entire region drained by the river, and that such rights were transferred to the United States by the Treaty of Florida, 1819. With reference to the claims derived through France, it was alleged that by the Treaty of 1763, between that country and Great Britain, the latter country had ceded to France all her claims in respect of the region to the west of the Mississippi, and that those claims had been transferred from France to the United States, by the Treaty of Louisiana, 1803.

To this statement the British plenipotentiary replied on the 12th of the same month, that the district in question never belonged to France, and was therefore not comprised in the Treaty of Louisiana. As to the Treaty of Florida, Spain had by previous treaty with Great Britain, dated 1790, acknowledged in Great Britain certain rights with respect to those parts of the Western coast of America not already occupied, the acknowledgment having special reference to the territory in question. In support of the British claim stress was laid on the discoveries of Meares and Vancouver, and other Englishmen, who had made explorations inland. As to priority of settlement, a trade establishment had, it was true, been formed by American citizens in 1811: but it passed during the war into the hands of British subjects, and was only restored to America in 1818 by an understanding between the Governments.

After diplomatic correspondence lasting over two years, a treaty on the subject was entered into between the two countries on the 15th of June, 1846, whereby it was provided that the line of boundary between British and United States territory should be continued westward, along the 49th parallel of north latitude, to the middle of the channel which separated the continent from Vancouver's Island, and thence southwards through the middle of the channel, and of Fucas' Straits to the Pacific Ocean; the right of navigation in the channel and straits being preserved to both parties.

The matter was not, however, destined to rest here. The commissioners appointed to determine the portion of the boundary running southward, were unable to agree, Great Britain claiming that the boundary line should be run through the Rosario Straits, and the United States claiming that it should run through the Canal de Haro. This dispute gave rise to much correspondence between the Governments of the two countries. Various attempts to settle the matter were made without success. Ultimately, by the Treaty of Washington of 1871, it was agreed to submit this to the arbitration of the Emperor of Germany. The two Governments accordingly submitted their cases to the Emperor, who referred them to three experts. In accordance with the report of the latter, an award was made in favour of the United States' contention. This award was subsequently accepted by Great Britain.

The Oregon Claims, Parliamentary Papers, 1846, Vol. LII. ; 1873, Vol. LXXIV.

THE DELAGOA BAY QUESTION.

Temp. 1872.

[PARLIAMENTARY PAPERS, 1875, VOL. LXXXIII.]

From 1823 to 1875, continuous disputes took place between the British and Portuguese Governments with regard to their respective claims to Delagoa Bay, on the East Coast of Africa. The district in dispute formerly belonged to the King of Tembe and Mapoota. It was contended on behalf of Great Britain—(1) that the territories, although discovered by the Portuguese, had never been taken possession of by them, and that the Portuguese dominions were bounded on the south by the Dundas or Lorenzo Marques River and English River, and on the east by the sea, and had at no time extended to the territories in question ; (2) that the whole country south of the Dundas, or Lorenzo Marques River, and English River, had remained free and independent until 1823, the native inhabitants under their chiefs retaining absolute dominion over the territory ; (3) that the chiefs, with the consent of the natives, had ceded the territory to Great Britain in 1823.

The Portuguese, on the other hand, claimed the territory in question, on the following grounds :—(1) that the bay and territory around it had been discovered by them as early as the 16th century ; (2) that they had continued in occupation and possession of the bay for three centuries ; (3) that the bay formed an approach to Portu-

guese territory ; (4) that the territory had been conceded to them by the Emperor of Monomotama in the beginning of the 17th century ; (5) that a grant had been subsequently made to them by the rulers of Tembe ; (6) that an express acknowledgment of their rights had been made by the chiefs of the tribes of Tembe and Mapoota ; (7) that their rights had been acknowledged by European nations ; and (8) that previously to 1823 their rights had also been acknowledged by the English.

In 1872 the matter was referred to the President of the French Republic, who made his award in favour of Portugal on the following grounds, viz. : (1) that the discovery of the bay had been made by Portugal in the 16th century ; (2) that Portugal had since claimed sovereignty and exclusive right of commerce over the place, and had maintained her pretensions against Holland and Austria, and that her pretensions had not been effectually disputed by either of those countries ; (3) that when England concluded a treaty with Portugal in 1817, she did not contest these rights ; (4) that in 1822 England recommended Captain Owen, to whom the alleged cession was made, to the good offices of Portugal ; (5) that if the weakness of the Portuguese authority in 1823, induced Captain Owen to consider the territory as independent of Portugal, the treaties subsequently concluded were nevertheless contrary to Portuguese rights ; (6) that almost immediately after the departure of the English, the chiefs of Tembe and Mapoota acknowledged their dependence on the Portuguese authorities ; (7) that even if the treaties had been made between parties capable of contracting, they would now be of no avail, the treaty relating to Tembe containing conditions that had not been performed, those relating to Mapoota having been for periods of time that had expired, and not having been renewed.

The Delagoa Bay Question, Parliamentary Papers, 1875,
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